No. 2334

IN THE

United States Circuit Court of Appeals

NINTH CIRCUIT

MAX G. COHEN,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Writ of Error to the United States District Court for the District of Oregon.

TRANSCRIPT OF RECORD.

Records of U.S. Circuit
Court of Appeals

8.50

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Defendant in Error.

Names and Addresses of Attorneys upon this Writ:

For Plaintiff in Error:

Ralph E. Moody, Roscoe C. Nelson, Thomas Mannix,
all of Portland, Oregon.

For Defendant in Error:

Clarence L. Reames, U. S. Attorney,
Portland, Oregon.

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In the District Court of the United States for the District of Oregon.

Be it Remembered, that on the 26 day of November, 1912, there was duly filed in the District Court of the United States for the District of Oregon, an Indictment, in words and figures as follows, to wit:

[Indictment.]

In the District Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA,

vs.

MAX G. COHEN,

Defendant.

UNITED STATES OF AMERICA,

District of Oregon—ss.

The Grand Jurors of the United States of America for the District of Oregon, duly empaneled, sworn and charged to inquire within and for the said district, upon their oaths and affirmations do find, allege and present:

That on to-wit, the 9th day of May, 1912, there came on to be tried before the Honorable Anderson M. Cannon, United States Commissioner for the District of Oregon, a certain issue in due manner joined between the United States of America and Jake Gronich upon a certain charge and complaint then and there pending before the said United States Commissioner against him, the said Jake Gronich, for a violation of the White Slave Traffic Act, which said com-

plaint charged that the said Jake Gronich had theretofore on or about the 8th day of April, 1912, at Cleveland in the state of Ohio, unlawfully, knowingly and feloniously procured and obtained a ticket and ticket and form of transportation and evidence of right thereto to be used in interstate commerce by a woman to-wit, Esther Wood, in going from the said Cleveland in the state of Ohio, to Denver in the state of Colorado, and from said Denver in the state of Colorado, to Portland in the state and district of Oregon and within the jurisdiction of this court, for the purpose of prostitution and debauchery and for an immoral purpose, to-wit, that she the said Esther Wood should live with him the said Jake Gronich as his concubine whereby the said woman, Esther Wood, was transported in interstate commerce from Cleveland in the state of Ohio to Denver in the state of Colorado and from Denver in the state of Colorado to Portland in the state of Oregon.

That before the trial of said issue, the defendant herein, Max G. Cohen, and on or about the 7th day of May, 1912, at Portland in the State and District of Oregon, did unlawfully, knowingly, feloniously and corruptly procure, advise, obtain and suborn one Esther Wood, to appear as a witness at the trial and hearing of said cause for the United States, and to give in evidence before the said United States Commissioner, certain matters material and relevant to the issue in substance and to the effect following to-wit:

That she the said Esther Wood had never practised prostitution in Baker, Oregon, and that she the said Esther Wood had never practised prostitution any place in the United States, and that she, the said Esther Wood had never practised prostitution in Portland, Oregon, and that she the said Esther Wood had never practised prostitution in Denver, Colorado, and that she the said Esther Wood did not remember having ever received certain postal cards theretofore sent to her by the said defendant, Jake Gronich, and that she the said Esther Wood did not remember or recollect having written or mailed certain postal cards sent to and received by the defendant, Jake Gronich.

And that afterwards, on to-wit, the 9th day of May, 1912, the said issue was tried and heard before the said United States Commissioner and the said Esther Wood appeared as a witness on behalf of the United States and was duly sworn by the said United States Commissioner, who was then and there an officer authorized by the laws of the United States to administer oaths, and took her oath as such witness before the said United States Commissioner that the evidence which she, the said Esther Wood would give at said trial and hearing, would be the truth, the whole truth and nothing but the truth; and it did then and there upon said issue, trial and hearing, become and was a material inquiry whether she, the said Esther Wood had ever practised prostitution in Baker, Oregon, and whether she, the said Esther Wood, had ever practised prostitution in Portland, Oregon, and

whether she the said Esther Wood, had ever practised prostitution in Denver, Colorado, and whether she, the said Esther Wood, had ever practised prostitution any place in the United States, and whether she, the said Esther Wood remembered having received a postal card theretofore sent to her by the defendant, Jake Gronich, which said postal cards were then and there exhibited to the said Esther Wood, and whether she, the said Esther Wood did remember or recall having written or mailed certain postal cards theretofore sent to and received by the defendant, Jake Gronich; and that the said Esther Wood, so being sworn and having taken her oath aforesaid, upon the 8th day of May, 1912, at Portland aforesaid, and upon the trial and hearing of said issue of said cause, did wilfully, corruptly and knowingly and contrary to her said oath, swear and depose before the said United States Commissioner, and in said United States Commissioners' Court amongst other matters material to the said inquiry, in substance and to the effect following, that is to say:

That she the said Esther Wood, had never practised prostitution in Baker, Oregon, and that she the said Esther Wood, had never practised prostitution in Portland, and that she the said Esther Wood had never practised prostitution in Denver, Colorado, and that she, the said Esther Wood had never practised prostitution at any place in the United States, and that she the said Esther Wood did not remember having received certain postal cards theretofore sent

to her by the said defendant, Jake Gronich, and then and there exhibited to said Esther Wood; and that she the said Esther Wood did not remember or recollect having written or mailed certain postal cards theretofore sent to and received by the defendant, Jake Gronich, and then and there exhibited to the said witness, Esther Wood,

WHEREAS, in truth and in fact it was not and is not true and at the time of so swearing and deposing, the said Esther Wood did not believe it to be true that she had never practised prostitution in Baker, Oregon, and that she the said Esther Wood had never practised prostitution in Portland, Oregon, and that she the said Esther Wood had never practised prostitution in Denver, Colorado, and that she the said Esther Wood had never practised prostitution at any place in the United States, and that she the said Esther Wood did not remember having received certain postal cards theretofore sent to her by the said defendant Jake Gronich, and then and there exhibited to her, the said witness on the witness stand, and that she the said Esther Wood did not remember or recollect having written or mailed certain postal cards theretofore sent to and received by the defendant, Jake Gronich, and then and there exhibited to the said witness, and

WHEREAS, in truth and in fact the said Esther Wood had practised prostitution in Baker, Oregon, and the said Esther Wood had practised prostitution in Portland, Oregon, and that the said Esther Wood

had practised prostitution at divers points and sundry places in the United States, namely, at Denver, in the state of Colorado, and at Astoria in the state of Oregon, and that she the said Esther Wood did remember receiving certain postal cards theretofore sent to her by the said Jake Gronich, and then and there exhibited to her, and the said Esther Wood did remember and recollect having written and mailed certain postal cards theretofore sent to and received by the said Jake Gronich, and then and there exhibited to her the said Esther Wood, all of which said matters the said Esther Wood then and there well knew.

WHEREAS, in truth and in fact, the said Max G. Cohen at the time he procured, advised, obtained and suborned the said Esther Wood, well knew that she, the said Esther Wood, had practised prostitution in Baker, Oregon, and well knew that she, the said Esther Wood had practised prostitution in Portland, Oregon, and well knew that she the said Esther Wood had practised prostitution at divers and sundry places in the United States, to-wit, at Astoria, Oregon, and at Denver, Colorado, and well knew that she, the said Esther Wood did remember having received certain postal cards theretofore sent to her by the said Jake Gronich, and which said postal cards were at the time of the trial of said cause, exhibited to the said witness, Esther Wood, and well knew that she, the said Esther Wood did remember and recollect having written and mailed certain postal cards theretofore

sent to and received by the said Jake Gronich, which said postal cards were then and there at the trial and hearing of said cause, exhibited to the said witness; and so the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do charge, allege and present, that Max G. Cohen, on or about the 7th day of May, 1912, did unlawfully, knowingly, corruptly, wickedly and maliciously suborn, obtain, procure and advise the said Esther Wood to commit wilful and corrupt perjury in and by her oath aforesaid before the said United States Commissioner so sworn and taken before the said Honorable Anderson M. Cannon, United States Commissioner aforesaid, as to a matter and matters material to said issue, which said matter and matters the said Esther Wood did not believe to be true as aforesaid, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Dated at Portland, Oregon, this 23rd day of November, 1912.

A True Bill.

GEO. POPE,
Foreman U. S. Grand Jury.
ROBERT F. MAGUIRE,
Assistant U. S. Attorney.

[Endorsed]: Indictment. Filed Nov. 26, 1912.
A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 23 day of January, 1913, there was duly filed in said Court, a Demurrer to Indictment, in words and figures as follows, to wit:

[Demurrer to Indictment.]

"In the District Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA,

vs.

MAX G. COHEN,

Defendant.

Comes now the defendant and demurs to the indictment herein upon the grounds:

I.

That more than one crime is attempted to be charged in said indictment, and said indictment consisting of one count.

II.

That the said indictment fails to state facts sufficient to constitute a crime.

III.

That the facts stated in the indictment do not constitute a crime.

RALPH E. MOODY,
Attorney for the Defendant.

I, Ralph E. Moody, attorney for the defendant herein, hereby certify that I have read the foregoing demurrer to the indictment herein, and that in my opinion the same is well founded in law.

Dated at Portland, Oregon, this 30th day of October, 1912.

RALPH E. MOODY.

[Endorsed]: Demurrer. Filed Jan. 23, 1913.

A. M. CANNON,

Clerk U. S. District Court.

And afterwards, to wit, on Monday, the 8th day of February, 1913, the same being the 82 Judicial day of the Regular November Term of said Court; Present: the Honorable R. S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

"In the District Court of the United States for the District of Oregon.

No. 5829. February 8, 1913.

Indictment: Sec. 215 P. C.

THE UNITED STATES,

v.

MAX G. COHEN,

This cause heretofore submitted upon demurrer to the indictment herein, came on regularly at this time for the ruling and decision of the Court whereupon after due consideration, it is Ordered that said demurrer be and the same hereby is overruled.

And afterwards, to wit, on Monday, the 17 day of March, 1913, the same being the 13 Judicial day of the Regular March Term of said Court; Present: the Honorable R. S. BEAN, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

[Plea to Indictment.]

In the District Court of the United States for the District of Oregon.

No. 5829

Indictment: Sec. 126 P. C.

THE UNITED STATES OF AMERICA,

v.

MAX G. COHEN.

Comes now the United States by Mr. George O. Mowery, the defendant appearing in his own proper person; whereupon for plea to said indictment charging the said defendant with violation of Section 126 of the Federal Penal Code the said defendant says he is not guilty.

And afterwards, to wit, on Wednesday, the 4th day of June, 1913, the same being the 81 Judicial day of the Regular March Term of said Court; Present: the Honorable R. S. BEAN, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

[Minutes of Trial—Verdict of Jury.]

In the District Court of the United States for the District of Oregon.

No. 5892

Indictment: Sec. 126 P. C.

THE UNITED STATES,

v.

MAX G. COHEN.

This cause came on regularly for further trial at

this time, pursuant to continuance, jury, attorneys for respective parties and defendant present as heretofore; whereupon Thomas Mannix, S. Abrams, D. Solis Cohen, W. M. Cake, A. G. Rushlight, S. Sichel, N. W. Roundtree, R. W. Schmeere, E. D. Connell, B. F. Boington, E. Lansing, J. F. Kerchma, and F. Collier were sworn and examined as witnesses on behalf of the defendant and thereupon evidence closed and thereupon defendant moves the Court for an order directing a verdict of not guilty and thereupon said motion having been duly argued and submitted, after due consideration, it is Ordered that said motion be and the same hereby is overruled, and thereupon after argument of counsel for respective parties and instructions of the Court the jury retire to consider of their verdict; and thereupon the jury having agreed return into Court their verdict as follows, "We, the jury duly empaneled, sworn and charged to try the above entitled cause, do find the defendant Guilty in manner and form as charged in the indictment. Dated at Portland, Oregon this 4th day of June, 1913. Hugh Cosgrove, Foreman" which said verdict is received by the Court and ordered filed and thereupon it is ordered that said defendant be admitted to bail in the sum of $5000.00 and thereupon on motion of defendant it is Ordered that the defendant have and hereby is granted thirty days from date hereof within which to serve and file motion for new trial.

And afterwards, to wit, on the 4 day of June, 1913, there was duly filed in said Court, a Verdict, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

No. 5829

UNITED STATES OF AMERICA,

vs.

MAX G. COHEN,

Defendant.

We the jury duly empaneled, sworn and charged to try the above entitled cause, do find the defendant guilty in manner and form as charged in the indictment.

Dated at Portland, Oregon, this 4th day of June, 1913.

HUGH COSGROVE,
Foreman.

[Endorsed]: Verdict. Filed June 4, 1913.
A. M. CANNON,
Clerk.
By F. H. DRAKE,
Deputy.

And afterwards, to wit, on Monday, the 4th day of August, 1913, the same being the 25 Judicial day of the Regular July Term of said Court; Present: the Honorable R. S. BEAN, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

[Judgment.]

In the District Court of the United States for the District of Oregon.

No. 5829

Indictment: Sec. 126 P. C.

THE UNITED STATES,

v.

MAX G. COHEN.

Comes now the United States by Mr. C. L. Reames, United States Attorney, the defendant, Max G. Cohen, appearing in his own proper person and by his attorney Mr. R. E. Moody; whereupon, this being the time set for the passing of sentence, upon motion of the United States for Judgment, it is Considered, Ordered and Adjudged that the said defendant, Max G. Cohen, be imprisoned in the United States Penitentiary at McNeil's Island, Washington, for the term of two years and that he pay a fine of $100.00 and that he remain imprisoned in said penitentiary until said fine is paid or until he is otherwise discharged by law, and thereupon it is Ordered that issuance of commitment herein be and hereby is stayed for thirty days from the date hereof and that defendant be admitted to bail in the sum of $10,000, and it is further ordered that defendant have and hereby is granted 30 days from the date hereof within which to serve and submit a proposed bill of exceptions herein.

And afterwards, to wit, on the 16 day of September, 1913, there was duly filed in said Court, a Bill of

Exceptions in words and figures as follows, to wit:

[Bill of Exceptions.]

In the District Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA,

vs.

MAX G. COHEN,

Defendant.

Be it Remembered, That on the 2nd day of June, 1913, the above entitled cause came on to be heard before the Hon. Robert S. Bean, District Judge of the above-entitled court, the said Max G. Cohen being then and there charged with the crime of subornation of perjury; and the said trial continuing from day to day up to June 4th, 1913, at which time the said cause was submitted to the jury; and the said jury thereafter rendered a verdict finding the defendant guilty.

Clarence L. Reames, United States District Attorney for the District of Oregon, and George Mowry, Assistant United States Attorney, appeared on behalf of the government, and Ralph E. Moody appeared on behalf of the defendant.

The facts alleged in the indictment as the basis of the charge were that the said defendant, Max G. Cohen, on or about May 7th, 1912, suborned one Esther Wood to commit wilful and corrupt perjury, contrary to her oath, before United States Commissioner Anderson M. Cannon, as to matters claimed and

charged in said indictment to be material in said issue, which said evidence so testified to by the said Esther Wood was false and untrue, and known to be false and untrue by the said Esther Wood at the time she so testified, and known to be false and untrue by the said Max G. Cohen at the said time he suborned the said witness Esther Wood to commit said perjury; the said matters to which the said Esther Wood so testified before the said Commissioner were that she, the said Esther Wood, had never practised prostitution in Baker City, Oregon, or in Portland, Oregon, or in Denver, Colorado, or in any other place in the United States, and that the said Esther Wood did not remember having received certain postal cards which it was charged had passed between the said Esther Wood and the said Jake Gronich; and the indictment further charged that said false testimony on the part of the said Esther Wood was given by her in a certain proceeding and a certain issue joined between the United States of America and Jake Gronich upon a charge pending before said United States Commissioner against the said Jake Gronich for an alleged violation of the White Slave Traffic Act; the said Jake Gronich being charged before said Commissioner with having transported the said Esther Wood from Cleveland, Ohio, to Denver, Colorado, and thence to Portland, Oregon, and with having purchased for her the railway tickets upon which she so travelled, and that he, the said Jake Gronich, so transported her for the purpose of prostitution and debauchery, and for an

immoral purpose, to wit:—that she, the said Esther Wood, should live with him, the said Jake Gronich, as his concubine.

The following exceptions were duly taken and allowed at the trial of the above-entitled cause:—

I.

An exception was duly taken and allowed to the refusal of the court to direct the jury to return a verdict of not guilty in the above entitled cause, upon the following grounds:—

I.

That no evidence has been introduced in the trial of said cause upon which a verdict of guilty can be based.

II.

The evidence which has been introduced in this cause is not sufficient to be the basis of a verdict of guilty.

III.

That the evidence fails to show that any crime has been committed by this defendant.

IV.

That the evidence is not sufficient to show that the defendant has committed the crime set forth in the indictment in this cause.

To illustrate this exception, the following evidence was given at the trial aforesaid.

ESTHER WOOD, a witness called by the government, testified in substance, so far as material to this

exception, as follows:—

I live at the Levens Hotel in Portland. My occupation is that of a sporting girl, and has been for the last three years, including the 9th day of May, 1912, in Portland. I practised prostitution in Baker in June and July, 1911; I went away for two months; then came back and remained for six weeks; and I lived in a crib at 1783 Auburn Avenue, practising prostitution all of that time and for two months after June, 1911, and I was in Baker City two months, and I lived in a crib at 1783 Auburn Avenue practising prostitution all that time and for two months after June, 1911. I practised prostitution in Portland for the first time in 1911 in the month of December, at the house of Sadis Parker, and at the Uncle Sam Hotel at 5th and Couch streets for about two weeks. I practised prostitution in May, 1912, at 82½ Third street, which is in the North end of Portland. That was about the 3rd or 4th of May, for only one day. In Denver I practised prostitution for two weeks in the spring of 1911, and for about two weeks in the fall of 1911, and for about two weeks in April, 1912. At the latter time May Swindle, Joe Albin, and my husband, Mr. Kramer,—known as Jake Gronich,—were with me.

On May 6th I lived with my husband, Jake Gronich, at the Levens Hotel, having come to Portland about a week before with my husband, Jake Gronich, and this May Swindle, and Joe Albin; and I had lived with him for three years prior to the 6th of May. He

was arrested on the 6th of May. At the time I was out with a girl named Rose Heller, and when I came back to the Levens hotel, the proprietor there, Mrs. Levens, told me that my husband had been arrested that night and that the detectives were waiting for me. She called up Rose Heller, and I spent the night at Rose Heller's room at the Oxford Hotel, room 3, arriving there between 12 and 1 in the early morning of May 7th, and I stayed there that night and the next day, being arrested on the night of the 8th.

I saw Mr. Cohen on May 7th at the Oxford Hotel in Miss Heller's room, about a quarter after 5. When he came in, I was in the room with Sadie Parker, Rose Heller, and Violet Woods. I wasn't quite sure who sent for him. When he came in I was lying on the bed feeling bad and crying, and as he entered he said, "Well, well, what is this all about?" and Sadie Parker told him that I was the girl with the two Jewish fellows who had been arrested at the Levens Hotel, whereupon Mr. Cohen mentioned Gronich and Albin, and said he had seen them that morning and that they had been turned over to the government, and were represented by Dawley, a negro lawyer with whom Cohen said he declined to be connected. Then Cohen asked me if I was married to Jake Gronich, and I hesitated about answering, but Sadie Parker told me that Mr. Cohen was my lawyer, and that I should tell him the truth, and I then told him that I was married, and had been in Portland a little over a week. I told him that I had sported in Portland one day, and

he said, "Oh, well, they won't find that out." Sadie Parker then told Mr. Cohen, calling him by his first name, that I had worked for her a little over two weeks the preceding winter, and Mr. Cohen told Sadie that she wouldn't have to tell that. Then he said, "They have to prove that she is a sporting girl."

Mr. Cohen then asked me whether I had any telegrams or letters in my trunk, and I told him that I didn't have any; that all I had consisted of postal cards at different places where I had worked, and he told me, "Well, if they should show you those, just say you don't remember." Mr. Cohen asked me if I came direct from Cleveland here, and I told him that May and I had stopped in Denver and had a sporting house together, and Sadie Parker said that if they scared May, she would tell the truth and get me up for perjury, and I asked the meaning of perjury, and Sadie Parker said to tell a lie. And Mr. Cohen said, "She can deny that she ever sported", and then he said that when they took me down I should see May, because if May told that she and I had sported together, I could say that I did sport, but that I was not brought here for immoral purposes, and when I sported I did it of my own free will; and if May didn't tell I could deny that I sported.

Sadie Parker then asked Mr. Cohen if he didn't think it best for me to leave town so they could not get me, and Mr. Cohen said No, that I might as well go down and give myself up; that they were bound to get me. Then Mr. Cohen said, "Now, I will give you

my card, and in case they do take you, call me up no matter what time it is; you call me up when they come down to take you", and he wrote down his 'phone number and gave me his card.

I told him I had some postal cards in my trunk from different places where I had sported, and he said, "When they show you, then just say that you don't remember". He went away just before 6, leaving his card, and saying that he had his machine and was going home to supper. I was arrested late that same night about half past 10 at the same room in the Oxford Hotel, and was taken to the city jail. Mr. Cohen told me at that time that he had a good stand in with the Government people, and he mentioned the name of assistant district attorney Evans. I told Mr. Cohen at that time that I had practised prostitution in Baker, Oregon, and also in Denver, Colorado, and that May and I had had a house together.

I didn't call Mr. Cohen that night, but I saw him the next morning at the city jail, and he wanted to know if May was there, and I told him she wasn't, and he said that they would take me up that morning and that I shouldn't talk until he got there, and should be sure and stick to my story. He asked me whether I was married, and I told him the name under which I was married, and where I was married, and he wrote it down; and he asked me was I sure that I had been married in the court house. I told him that I was, and was married by the squire. He then said that they would have to prove that I was a sporting woman,

and said, "Well, they have to prove that you are a sporting woman", and that I could deny it, and could deny I had ever been a sporting woman." Mr. Cohen then told me to deny that I ever was a sporting woman. He then said that if I saw May down there, and she should say that I worked with her in Denver, that I should say Jake Gronich didn't bring me here for immoral purposes, and what I did, I did of my own free will.

I was taken down here to the post office that morning and put in a room and sworn. I told them I refused to answer and wanted to see my attorney, Mr. Cohen. I didn't testify that day, and they took me back. First Mr. Cohen came in and spoke there for a while, and then I went into the hall, and he asked me did I talk, and I told him No, and he said Good. Then he asked if he could see Mr. Pray a moment, and Mr. Pray told him to come around to his office, and Mr. Cohen told Mr. Pray there that I was married to Jake Gronich. Mr. Pray is one of the government men. I didn't testify at all that morning, and they took me back to the city jail. I saw Mr. Cohen the next morning at the city pail. He was in very much of a hurry and told me to stick to my same story, and asked me had I seen May. I told him No. They brought me back to the post office building in the morning of that same day, after I had seen Mr. Cohen, taking me to a different room; but I wasn't sworn that morning, and they took me back to the city jail. I saw Mr. Cohen at the city jail that noon, and he told me to stick to my

same story, and that they would have the preliminary hearing at some time that afternoon, and he told me not to talk until he got there.

They brought me back to the post office building that same afternoon, and put me on the stand, Mr. Cohen being present, and I testified that afternoon of May 9th just as Mr. Cohen advised me to tell. They asked me had I ever practised prostitution in Baker, and I told them No, knowing at the time that I had, as a matter of fact, practised prostitution in Baker, and so testifying because Max Cohen advised me to. They asked me whether I practised prostitution in Denver. I said No, knowing as a matter of fact that I had, and so testifying because Mr. Cohen advised me to. They asked me had I ever practised prostitution at any place in the United States. I told them No, knowing that it was untrue, and that I was swearing falsely; and they asked me had I ever practised prostitution in Portland, and I told them No, knowing that I had, and so testifying because Mr. Cohen advised me that way, and said it was the only way to save Jake Gronich, because they found the tickets on him.

At that examination they exhibited the postal cards to me, which I recognized, and the one now shown me is one of them. It was sent me by Jake Gronich, from Canton, Ohio, and received by me in Denver, Col. (Postal card marked Government's Ex. 4). I also recognize this card, which was shown to me at that examination and which was received by me in Port-

land, Oregon, from Jake Gronich. They asked me at the examination had I ever seen this card, and I said once No, and then I said that I didn't remember, and I knew I had seen the card before and was swearing falsely. I so testified because my lawyer advised me to.

Another card was shown to me, which is in my own handwriting, and they asked me whether it was my handwriting, and I told them No, and then I told them that I didn't remember; and when they asked me had I ever seen the card before, I told them that I didn't remember. I knew at the time that I had seen it before, and did remember it, but I so testified because my attorney advised me to. The Max G. Cohen I have spoken of as my attorney is the defendant here.

When I was called before the Commissioner I gave the name of Esther Wood, and when they asked me if that was my right name, I said No, my right name was Grace Reimers, which is my right name, though I go under the name of Esther Wood and did at that time. I have been indicted for perjury, and the case is still pending.

On cross-examination, the witness testified as follows:—

The first time that I ever met Mr. Cohen was at the Oxford Hotel, May 7th. I didn't know him at all before that time. He was there from 5.15 to just before 6. It was before 6 when he left because the girls said they had an engagement to supper at 6. Mr. Cohen was there over half an hour, but not

for an hour. I didn't send for him, or request that he be sent for and am not sure who sent for him because I remained in the room. I heard Rose Heller, the girl I stayed with that night at the Oxford, talk about an attorney, but I didn't know she had sent for one. She was there when Mr. Cohen was, and I think but I am not sure, that she sent for him. I talked to him because, just before he came in, I heard one of the girls say they would call him on the 'phone, and when he came in I didn't know he was for me, but they said they would call a lawyer at the telephone, and I was lying on the bed rather sick, and he came in, and Sadie Parker talked to him first, telling him I was the girl with the two Jewish fellows taken out of the Levens Hotel. I said nothing at the time, and Mr. Cohen said he had seen them, referring to the two men who had been arrested that morning, and that they were turned over to the government, and Sadie Parker said she knew that. Mr. Cohen then turned around and said, "Why this May is married to t' 's Joe Albin". I had not known that before. He then asked was I married to Jake Gronich, and those were his first words to me. I hesitated to answer, but I told him I was married after Sadie Parker told me that he was my lawyer, and that I should tell him the truth.

I had not been arrested at that time. I was arrested that same night about 10.30 (May 7th). I retained Mr. Cohen that afternoon as my lawyer. I paid him nothing for his services. Sadie Parker told him we

were down and out; we didn't have any money, but she would go around among the Jewish people and pick up a collection, and she would pay him. I didn't know whether he was paid anything or not. He asked me once at the city jail if I had any money, and I told him No, but I told him I did get out that I would pay him. He said "That is all right; I am not worrying about that; that is all right". I told him I was married to Jake Gronich. I told him at that time I had been practising prostitution in Portland, in Baker City, Denver, Col., and Cleveland, Ohio. How I happened to tell him this was that when Sadie said that if they scared May, she would tell everything, and I told him "Yes, I worked with May in a house together in Denver, and I have worked with her back east." But he said, "Well, when you see her, then if she should tell that, then you tell that he didn't bring you here for immoral purposes, and that you did it of your own free will. If she doesn't tell it, deny you sported. That is the only way to save him because they found the receipts, the railroad tickets, right in his pockets."

I was taken that same night about 10.30. I knew they would take me as a witness for him. I wasn't charged with any crime. I was arrested by a plain clothes man. I didn't know whether he was a government official or a city official except that they took me down to the city jail. I remained in the jail all night, and remained there until May 9th, and then they took me down to the county jail. I was there 7

months in the county jail; I was held as a witness two months, and after that they indicted me for perjury. I am under indictment for perjury now, for perjury committed at this hearing before the Commissioner. They let me out of the county jail the day before Thanksgiving, 1912. The bail was $50. of my own money. My bail was fixed at $1000., I guess, but I didn't have anybody to go my bail, and I think some of the time there was no bail set for me. I heard it was $1,000 when I was indicted for perjury. My bail was reduced to $50. just the day before Thanksgiving. It happened to be reduced to $50. because I had been in there 7 months, and I told them I would not go away, I would stay right there and not go away, and they said they would take my trunk, but they didn't take it, and that was all the money I did have. I didn't have this $50. when first arrested. My husband sent me $30 from the penitentiary, and I had $15. witness fees. The witness fees were from the government. I think I got $13 witness fees, then I put up $20 of my own money. The government gave me the $15. about two weeks before I got out on bail. I knew nothing of the bail being fixed at $50. until they called me up, and it was Mr. Evans called me up, and said "Come on down, I will speak to you. Now if we leave you out on a small bail, will you run away?" And I told him I wouldn't, that I would come down and report every day. Mr. Evans was U. S. District Attorney at that time. To get the $13. from the government I went in with Mr. McSwain for witness fees.

Mr. McSwain is one of the officials here. They gave me a paper for witness fees, about $13 when I went out for my bail, and I believe I got some from the government. I don't remember how much they gave me, —$13.—and I had $35 from my husband, and $15 they put to the bail.

The next time I had a conversation with Mr. Cohen after this talk in the Oxford, was the next morning at the city jail. That was after I was arrested. I had not testified at that time. The conversation was held at the city jail. I didn't have the postal cards introduced in evidence when I talked with Mr. Cohen at the Oxford hotel on the evening I talked with him. The postal cards were in the Levens Hotel in my trunk. I told him that I did have postal cards. He asked me if I had any telegrams or letters, and I told him No, the only thing I had was postal cards. He said, "Well, if they show you them, just say you don't remember". Mr. Cohen never saw the postal cards; the first time I saw them, after seeing them in my trunk, was when I got on the stand and they showed them to me. The conversation I had with Mr. Cohen wasn't in the cell, but out in the hall. There was nobody present but myself and Mr. Cohen; I was there with him alone. In that conversation he asked me if I had seen May, and I told him No, I didn't see anything of her, and so he said, "Well if she don't come up and tell that you worked with her in Denver you stick to your same story and deny that you ever sported." I had not tes-

tified at all at that time. The conversation lasted but a short time, about 15 minutes. I then came up here to the court and testified before Commissioner Cannon. Mr. Cohen was present when they had the preliminary hearing;—not that day but the next. Mr. Cohen told me at the jail, when I told him May wasn't there, that they must have her in the county jail, and that if I saw her, and she told that we had a house in Denver together, that I should say I was not brought here for immoral purposes; but if May did not tell, then I should deny that I had ever sported. That was on the morning I was taken down before the Commissioner, and Mr. Cohen wasn't there, and Mr. Cohen told me that if they took me down I should no speak unless he was present. They brought me up here; Mr. Cohen wasn't here, and I wouldn't talk. Mr. Cohen got up here that morning, but I had no talk with him before I continued my testimony. I talked to him at the city jail and at the court house; just as I got off the stand, he went into the hall and asked me did I talk, and I told him No, and he said Good, and then he asked could he go to Mr. Pray's office, and he told Mr. Pray in my presence that I was married to Jake Gronich, and it is a fact that I was married to Jake Gronich.

The first person that I told that Mr. Cohen had told me to deny that I was a prostitute was a lawyer I had named Miller, and then I told McGuire, the Deputy District Attorney the next day after my husband was taken to the penitentiary, and when I found

that I had been indicted for perjury. I didn't tell McGuire that until after I had been indicted, and the way I happened to tell him was that I went down there and asked him if I could plead guilty, and told him I had lied, but had been forced to do it, and he asked me by whom, and I told him I took Max Cohen's advice; Mr. Cohen forced me to lie.

Q. How did Mr. Cohen force you to lie?

A. Well, he told me up in the room, he told me to deny that I ever sported, and I didn't see May—of course when I would have seen her I would have seen if she did tell that she had sported with me, and then I would have told I sported, but I didn't see her; I didn't get no chance to see her, and they put me on the stand and asked me if I sported, and I said "no".

Q. Well, and how was it that you happened to tell Mr. Maguire that Mr. Cohen told you to do this?

A. Why, because it is the truth.

Q. I know, but what occasioned you to tell Mr. Maguire that?

A. Well, he told me that if I told him,—he told me that they were going to sentence me to Lansing—to Kansas—he told me I was to be sentenced to Lansing, Kansas, to the penitentiary, and I said "Yes, can I plead guilty right away", and he said, "You have to wait for the Grand Jury", and I told him, I said, "Yes, I will plead guilty, but", I said, "I was forced to do so", and he asked me then and I told him that I took Max Cohen's advice.

They never brought me on to plead guilty, saying

I would have to wait for the grand jury, and I have never pleaded guilty. I told them and admitted that I was guilty of lying, but that I was forced to do so. I don't remember for sure when I was indicted by the grand jury, but I think it was right after my husband was sentenced to the penitentiary, or it was before.

Q. Why has not your case been brought on for trial?

A. Why, I was to wait for the grand jury, I think?

Q. Well, I know, but the grand jury indicted you some several months ago. Now, why hasn't your case been brought on for trial?

A. It is on trial now, isn't it? It is on trial now. This is the trial now.

Q. You imagine this is your trial here?

A. I don't know.

I don't remember the district attorney saying anything to me about the trial of my case; they subpoenaed me two weeks ago. I had a talk with them when I got out on bonds, and they told me I wasn't to go away from Portland, and that I was under bonds, and they told me I was under bonds for Max Cohen's trial. I guess he was up for perjury too. They didn't tell me when my case was to be brought on for trial. I don't know whether I have had any understanding with the government about my case. I am held as a witness now. I agreed to plead guilty before I was indicted. I had no understanding with them in regard to pleading guilty after I was indicted. Mr. Pray and Mr. Maguire came and talked to me

about my swearing falsely; they all told me that I was, after I got off the stand, and they had conversations with me in the court house several times. I first told them about Mr. Cohen giving me advice when they sentenced my husband, which was two months after I had testified. The way I happened to tell them that was that I saw in the paper that I was up for lying, for perjury, and I went down and asked if I could plead guilty, and told them I had lied and was forced to do so by my lawyer, Max Cohen. The government has not promised me anything in regard to my case, and I have no understanding with them. I don't know whether I will be prosecuted for perjury. I lied, but I was forced to do so. I have been indicted for perjury and have offered to plead guilty before I was indicted, but I have not pleaded guilty and I am out on $50 bail. I was indicted for perjury, and they told me they would dismiss it on my own recognizance, but that I wasn't to go away. I am quite sure they used the word dismiss. The man who came down and said I would be let out on my own recognisance was Mr. Duke from the marshal's office. When I talked with Mr. Evans, and told him in answer to his question, that I wouldn't run away, he said he would try to put my bond as low as he could, and asked me if I could put up $50. I told him Yes, that was all I had. I dont quite remember what Mr. Evans said about dismissing. I didn't have any talk with Mr. Maguire or Mr. Mowry when I went out. I just spoke to Mr. Mowry about my case Saturday, and

never saw him before then. I didn't talk with anybody else nor with Mr. Maguire. The only time I have talked with Mr. Maguire since I have been in jail was when I went down to plead guilty, and told him about Mr. Cohen telling me to deny that I had ever sported. I don't remember talking to anybody after Mr. Maguire. I talked to Mr. Pray once afterwards, but not the same day. I have talked to Mr. Pray a great many times. He was at the jail quite a few times, but not exactly to see me, and I spoke to him then. Mr. Pray didn't advise me to testify against Mr. Cohen, and nobody else said anything to me about it. "I said that when I was going to plead guilty that I was going to say that I wasn't the cause of it because I was forced to do so." I didn't know whether I expect to be sent to the penitentiary, but I know I am not afraid. I have no promise from the government. I don't know whether I will be sent to the penitentiary.

Mr. Cohen was not acting as Mr. Gronich's attorney, but when he came to the hotel he seemed to know quite a bit about it because he told me that May was married to Albin, and I hadn't known that. I did just as Mr. Cohen advised me. Gronich was my husband, and of course I know I was sporting and all, and he had the tickets right on him. I didn't think there would be any chance to save him, and he told me that would be the only way I could save him. I wasn't indicted for any offense at that time. I did as Mr. Cohen advised me to do. I thought if that would save

my husband, I would do so. I didn't know anything about the law, and had never been to school in my life, and he told me that was the only way to save him, and I took his advice.

On re-direct examination, Esther Wood testified as follows:—

I didn't know whether my trunk at the Levens Hotel had been seized by the officers when I was talking to Mr. Cohen at the Oxford. I was married in Cleveland, Ohio, in the court house, by the squire, on December 10, 1910. I have been his wife ever since that marriage, and have never been divorced.

On re-cross-examination, the witness, Esther Wood, testified as follows:—

I was convicted once in the police court of prostitution and pleaded guilty. They had me up for vagrancy. I have been sporting ever since they turned me out of jail. I pleaded guilty. That was since they let me loose from jail up here. They arrest all prostitutes as vagrants. I am now living in a house of ill fame. I first I reported to the government pretty often, and I think they know I am down in a house of prostitution.

ROSE HELLER, a witness called on behalf of the government, testified in substance, so far as material to this exception, as follows:—

I am acquainted with a girl named Esther Wood. I have been sitting here in the court room, and saw her on the stand. I first met her at Baker City in

about that. She told Mr. Cohen herself she was married; Mr. Cohen didn't ask her. Mr. Cohen didn't ask her whether she had been sporting. I didn't hear anything about Denver, but just those two towns, Baker and Astoria, that is all. After she told him that, Mr. Cohen said, "You don't have to say that; they won't find that out". He told her not to say that she had been sporting. I can't remember his exact language. The only words that I remember are that she said she was sporting in Baker and Astoria, and here one day for Sadie Parker. Those few words I remember, and Cohen said, "You don't have to say you sported", he said, "they won't find you out." At that time Esther had not been arrested, and nobody knew that she would have to testify any place. Esther knew that she was going to be arrested because she heard that Gronich was,—that the government had got in, so she knew there was no chance for her to run away. I do not remember hearing Esther Wood in that conversation say anything about anything else.

Q. And when Mr. Cohen told her that she should testify that she wasn't a prostitute, he said this openly, did he, in the presence of all of you?

A. Yes, sir.

Q. That is, he advised her to commit perjury, openly in the presence of everybody right around?

A. Yes.

I haven't done anything for a whole year, nearly; I have been sick. I had been living at the Oxford, but I have now moved to the Levens, and I have not

been sporting for over a year. I have money of my own. I never gave any written statement of this case. When I talked to Mr. Mowry Saturday they brought out a written statement of what I had said when I was brought up here last September, and they read it to me. I wasn't there when Esther Wood talked; I came half an hour later? I never asked Esther Wood what was going to become of her case.

VIOLET WOODS, a witness called on behalf of the government, testified in substance, so far as material to this exception, as follows:—

I live at the Levens Hotel, and my occupation is a sporting girl. I am acquainted with the defendant, Max G. Cohen. I have seen him once, that was the day after Gronich's arrest, either May 6 or 7, 1912. I was in Rose Heller's room before he came in, Rose Heller, Esther Wood and Sadie Parker were also there. It was some time after 5 o'clock before he arrived. I think he stayed about half an hour. I don't know whether Sadie Parker or Rose Heller called for him. Esther Wood was on the bed crying, and Mr. Cohen said "What does this mean, and what is this about?" Sadie Parker says, "She is the girl of the two fellows that were taken last night." Mr. Cohen said "Yes, I just came, I was up there and saw them turned over to the marshal", and he said, "They have a colored lawyer". Sadie Parker asked if he could do anything. He asked Esther if she was married, and Esther hesitated, and she didn't want to say anything, and Sadie Parker said, "Esther, you can tell

Max because he is your lawyer, and he can see what he can do for you", and Esther didn't want to tell him anything at first, and finally we told her, all of us, "Go ahead, tell Max Cohen; maybe he can do something for you". Esther started to tell about her case, and she said, "We came up here with this May and this Joe", and he said, "Yes, I know, I have heard May was married to him", and Esther spoke up and said, "Is that so?" She was kind of surprised, and he said, "Yes, I think she said she was married", and so Sadie Parker handed Esther $3.00, and she said I would give her $5., and we would see if we could not get her away from here. Mr. Cohen said that would not do; "It is no use for her to go away", as we asked him if that would not be best. He said, "No, I wouldn't advise her to go away; if she goes away she might just as well give herself up to the government, go up and give herself up." He said, "She has no chance to get away", and Esther had told him the different places where she had been, and she told him where she had sported one day here. She said about these different places, "What will they do if they find out?" and Mr. Cohen said, "Well, have you sported since you have been back?" She said, "Yes, I have sported one day on 3rd street since I have been back". Sadie Parker then said, "She worked for me last year about Christmas day, something like that", and he said, "They won't find that out; you can say you were rooming there", and Sadie Parker said, "She has been at Astoria", and Esther Wood spoke up and told Mr.

Cohen that when she was on her way out here she had a house with May in Denver, and she said she was here last year in Baker City, and sported in Astoria and Portland since she came back, and he said, "They will have to prove you have been sporting; I don't think they can find out." And Esther Wood said, "What will I do if they do find out?" He said, "Well, if they do find out, May has told you have (been sporting), just find out she has told. They might scare you and tell you, but find out for yourself. Then you can say you did it of your own accord, but your husband didn't know anything about it, and if she tells you have been sporting, say that Jake didn't know anything about it", that she had done it of her own free will, and if May didn't tell, Mr. Cohen told her to deny that she had ever been sporting.

Mr. Cohen asked her if she had any letters or telegrams in her trunk, and she said she didn't know whether she had any letters or telegrams or not, but thought she had some postals that Jake sent her, and that they were in Jake's handwriting, and Mr. Cohen said, "Well, if they show you those postals, you can say you don't remember anything about them; you don't remember them."

On cross-examination Violet Woods, so far as material to this exception, testified as follows:—

There were 5 of us in the room including Mr. Cohen, and all the conversation was held openly in the presence of everybody. Mr. Cohen asked Esther first how long she had been back, and she said just a few

days, and he asked her had she been sporting since she came back, and Esther didn't want to say anything. After that Esther started to tell him that she came out here with May and Joe Albin. I told Mr. Cohen I was down in Astoria, and Esther was sporting there, and Mr. Cohen said, "Well, they can't find that out; they will have to prove it". And Esther asked what she should do if May told that they had had a house in Denver, and Mr. Cohen said that she should find out first that May had told, and if May had told, that she could say that she did it without her husband's knowing it and of her own free will; and that if May didn't tell, she could deny she had been sporting. He told her twice she could deny it. At that time Esther Wood had not been arrested and nobody had seen her.

I talked to Lawyer Miller and Mr. Maguire and Mr. Evans after Esther was arrested for perjury. She was in jail, but was supposed to get out the next day after Gronich was sentenced. Esther didn't tell me she was going to plead guilty; I didn't know anything about that when I went up to the jail to see her. She told me she was held as a witness against Max Cohen. That was on the second day after Jake Gronich's sentence.

I am a prostitute and live at the Levens Hotel.

To further illustrate this exception, a copy of Government's Exhibit 3 is annexed to this bill of exceptions, made a part hereof, and marked Exhibit A.

Also Exhibit I introduced by the government, is referred to to illustrate this exception, and is as follows:—

UNITED STATES OF AMERICA,

District of Oregon.—ss.

Complaint for violation of White Slave Traffic Act.

THE UNITED STATES

vs.

JAKE GRONICH.

Before me, the undersigned, a United States Commissioner for the District of Oregon, personally appeared this day Charles P. Pray, who, on oath, deposes and says that the said Jake Gronich, on or about the 8th day of April, 1912, at Cleveland in the state and district of Ohio, did unlawfully, knowingly and feloniously procure and obtain a ticket and tickets, and form of transportation and evidence of right thereto to be used in interstate commerce by a woman, to-wit: Esther Wood in going from the said Cleveland, in the State of Ohio, to Denver in the State of Colorado, and from the said Denver in the State of Colorado to Portland in the State and District of Oregon and within the jurisdiction of this court, for the purpose of prostitution and debaucher and for an immoral purpose, to-wit: that she, the said Esther Wood should live with him, the said Jake Gronich, as his concubine, whereby the said woman, to-wit: Esther Wood was transported in interstate commerce from Cleveland in the State of Ohio to the City of Denver in the State of Colorado and from the said

Denver in the State of Colorado to Portland, in the State and District of Oregon, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

And furthermore the said deponent says he has reason to believe and does believe that Esther Wood and May Swindle alias May Weller are material witnesses to the subject matter of this complaint.

CHARLES P. PRAY.

Subscribed and sworn to before me this 7th day of May, 1912.

A. M. CANNON,
United States Commissioner.

It is hereby certified that the foregoing evidence and the other evidence contained in this Bill, and the exhibits hereinbefore and hereinafter set forth contain all of the evidence material to the matter to which this exception relates.

II.

An exception was duly taken and allowed to the introduction of the complaint against Jacob Gronich, which said complaint is Government's Exhibit 1, and is copied in full in the preceding exception, and which said complaint is hereby referred to and made a part of this exception; the grounds for this exception being that said complaint is immaterial, for the reason that the indictment sets forth that on the 9th day of May, 1912, there came on to be tried before the Hon-

orable Anderson M. Cannon, United States Commissioner for the District of Oregon, a certain issue in due manner joined between the United States of America and Jake Gronich upon a certain charge and complaint then and there pending before the said United States Commissioner against him, the said Jake Gronich, for a violation of the White Slave Traffic Act, which said complaint so referred to in said indictment, is the complaint copied in full in the preceding exception, and referred to as Government's Exhibit 1.

To further illustrate this exception, the indictment in the above-entitled cause is hereby referred to and made a part of this exception.

It is hereby certified that the foregoing evidence and the other evidence contained in this bill, and the exhibits hereinbefore and hereinafter set forth, contain all of the evidence material to the matter to which this exception relates.

III.

An exception was duly taken and allowed to the introduction of evidence of the fact that Esther Wood practised Prostitution at Baker City, Denver, Colorado, or anywhere else within the United States, on the ground that such evidence was incompetent, irrelevant and immaterial.

To Illustrate this exception, Anderson M. Cannon, a witness called by the government, so far as material to this exception, testified in substance as follows, with reference to statements made by Esther

Wood at the preliminary hearing conducted by him under the complaint against Jacob Gronich, incorporated in the first exception herein, and which complaint is designated as Government Exhibit 1, and is hereby especially referred to and made a part of this exception:

A. M. CANNON

I am United States Commissioner for Oregon, also Clerk of the United States Court here. I remember the complaint filed against Jacob Gronich. Esther Wood testified as a witness May 9, 1912. This oath was administered by myself, and her testimony was reduced to writing.

Esther Wood testified that she did not practice prostitution in Baker City, nor in Denver, Colorado, nor at any other place or at any other time. All of the testimony of the said Esther Wood was given by her under oath. The oath was the usual one and was as follows:—'You do solemnly swear the testimony you are about to give in the case now pending wherein the United States is plaintiff and Jake Gronich is defendant will be the truth, the whole truth and nothing but the truth, so help you God'.

On cross-examination, the said A. M. Cannon testified in substance, so far as relevant to this exception, as follows:—

Esther Wood was not a defendant in the hearing before me held on the 9th of May, 1912. She was a witness subpoenaed by the government.

As a part of its case in chief, the Government offered testimony to the effect that all of the evidence contained in Government's Exhibit 3, hereto attached, was given by the witness Esther Wood under oath before said United States Commissioner Anderson M. Cannon at the said preliminary hearing of the said defendant Jake Gronich.

ESTHER WOOD, a witness called on behalf of the government, so far as material to this exception, testified in substance as follows:—

I lived in Baker City, Denver, Colorado, Cleveland, Ohio, Astoria, Oregon, and Portland, Oregon, and I have practiced prostitution in all these different places. At the preliminary hearing under the complaint against Jake Gronich before U. S. Commissioner Cannon, I was asked whether I had ever practised prostitution at Baker, or Denver, or Portland, or any other place in the United States, and I answered No, whereas as a matter of fact, I had practised prostitution in the said places. I gave such testimony falsely because the defendant, Max G. Cohen, had advised me so to do.

It also appeared from the testimony that Esther Wood had been married to Jacob Gronich at Cleveland, Ohio, December 10, 1910, and that at the date of the trial of the above-entitled cause, the said Jacob Gronich and Esther Wood were still husband and wife, and had never been divorced.

To further illustrate this exception, the indictment in the above-entitled cause is hereby referred to and made a part hereof.

To further illustrate this exception, Governments Exhibit 3 in which is contained all of the evidence given at the preliminary hearing before Commissioner Cannon which was introduced in evidence in the above-entitled cause, is hereby referred to and made a part hereof, and a copy is hereto attached, in connection with the first exception here in, marked Exhibit A.

It is hereby certified that the foregoing evidence and the other evidence contained in this bill, and the exhibits hereinbefore and hereinafter set forth, contain all of the evidence material to the matter to which this exception relates.

IV.

An exception was duly taken and allowed, on the grounds of incompetency, immateriality and irrelevancy, to the introduction of certain postal cards, marked Government's Exhibits 4, 5 and 6, which said exhibits are hereby referred to and made a part hereof, and copies of which are hereto attached marked Exhibits B, C and D; and an exception was also taken and allowed to the introduction of any testimony with reference to said cards. The introduction of said exhibits, and testimony with reference thereto, was allowed by the court for the purpose of showing the relationship between Jacob Gronich and Esther Wood.

FRANK L. BUCK, a witness called on behalf of the government, testified in substance, so far as pertinent to this exception, as follows:—

A number of postal cards were exhibited to Esther Wood at the preliminary hearing before United States Commissioner Cannon on May 9, 1912, and questions were asked her about them, and Esther Wood denied that the postal cards were hers or that she had ever seen them before, except as to one postal card which she said she saw at Canton, Ohio, but did not know the handwriting, and that she had seen another postal card at another place, but did not remember where it was from; and when pressed as to her knowledge of said postal cards, refused to answer. Asked again as to the handwriting on one of the postal cards, Esther Wood testified that she didn't remember and that it was not in her handwriting, and that she didn't remember whether she had ever seen the card before; and as to another postal card, that she did remember seeing it.

ESTHER WOOD, a witness for the government, in so far as pertinent to this exception, testified in substance, as folows:—

At the preliminary hearing before U. S. Commissioner Cannon they exhibited to me the card, Gov. Ex. 4. This card was sent to me from Canton, Ohio, by Jake Gronich, and I got it at Denver, Colorado, I don't remember just when. Another card, (Gov. Ex. 5), was exhibited to me at the preliminary hearing.

Jake Gronich sent this card to me and I got it in Portland. At the preliminary examination before U. S. Commissioner Cannon, they asked me if I had ever seen this card, and I remember saying once No, and again that I didn't remember. At the time I so testified I did remember seeing the card before, and knew that I was swearing falsely, but so testified because my lawyer advised me to. As to Gov. Ex. 6, at the preliminary hearing before U. S. Commissioner Cannon, they asked me if Jake Green sent me this postal, and asked me if I knew any fellow named Jake Green, and I said No, and they asked me if he sent it to me, and I said once No, and again that I didn't remember. At the time I did remember. A card was exhibited to me which was in my own handwriting, and they asked me if it was my writing, and I said No, and they asked me again, and I said I didn't remember, and they asked me had I ever seen the card before, and I told them that I didn't remember, and at time I so testified I knew I had seen it before, and I did remember, and I so testified because my attorney advised me to.

When I talked with my lawyer Max Cohen at Room 3, in the Oxford Hotel on May 7th, I told him I had some postal cards in my trunk from different places where I had sported. He said, "When they show you, just say that you don't remember".

On cross-examination the witness testified, in substance, as follows:—

At the time I had the conversation with Mr. Cohen

at the Oxford Hotel, he didn't see these post cards, and I didn't have them at the hotel; they were in my trunk at the Levens Hotel. The first time I saw them, after seeing them in my trunk, was when I got on the stand and they showed them to me.

It also appeared from the testimony that Esther Wood had been married to Jacob Gronich at Cleveland, Ohio, December 10, 1910, and that at the date of the trial of the above-entitled cause, the said Jake Gronich and Esther Wood were still husband and wife, and had never been divorced.

An to further illustrate this exception, Government's Exhibit 3, filed with the first exception herein as Exhibit A, is hereby specially referred to and made a part of this exception.

It is hereby certified that the foregoing evidence, and the other evidence contained in this bill, and the exhibits hereinbefore and hereinafter set forth, contain all of the evidence material to the matter to which this exception relates.

V.

An exception was duly taken and allowed to the following part of the charge of the Honorable Court to the jury in the above-entitled cause:—

Now, it appears, or there is evidence tending to show that Esther Wood was the wife of Gronich at the time of his arrest, and had been for some time prior thereto. That would not excuse him from a violation of the white slave traffic act. No man has

a right to transport his own wife from one state to another for the purpose of prostitution, so the fact that she was his wife would be wholly immaterial upon that inquiry or upon this.

Among other instructions given by the Court to the jury was the following:—

Now, something has been said about the manner in which Miss Wood was treated before the Commissioner. Now, I do not think that is very material in this case. If she was sworn and testified as a witness in that case and knowingly and wilfully testified falsely, she committed perjury and that is about all that is necessary to be said about that matter. It is one of the facts in the case and you have a right to weigh it along with all the other testimony in the case; but however badly she may have been treated or however wrongly she may have been treated would be no justification or excuse on behalf of this defendant if, as a matter of fact, she committed perjury at his request or his instigation.

The testimony of Esther Wood, a witness for the Government, was uncontradicted at the trial that she was the wife of Jake Gronich, the defendant at the preliminary hearing before Commissioner Cannon on May 9, 1912, and held under the complaint, set forth in full under Exception 1, and hereby referred to and made a part hereof; and said relation of husband and wife between Jacob Gronich and Esther Wood existed at the time of said preliminary hearing before United States Commissioner Cannon, at which hear-

ing appeared the testimony of the said Esther Wood with reference to her prostitution and with reference to the postal cards, which testimony is charged in the indictment herein as being perjured, and as having been suborned by the defendant herein; and that the said Esther Wood was required to testify at the said preliminary hearing against her husband, Jake Gronich, over her objections and under threats of punishment for contempt of court in case she refused to testify.

To further illustrate this exception, Government's Exhibit 3, which is hereby annexed and already marked Exhibit A under the first exception herein, is hereby specially referred to and made a part of this exception.

EDWARD L. NORRIS, a witness called on behalf of the government, testified as follows:—

I live in Denver, Colorado. My occupation is that of a patrolman; I have been a member of the Denver police force for six years; I have been in the courtroom during this trial and have heard the testimony of Esther Wood; I know Esther Wood and I saw her in Denver on or about February 15, 1912, at which time she was a prostitute and was carrying on her said trade at a crib on Morgan street. A girl by the name of May Swindle was with her at that time.

E. M. HOUGHTON, a witness on behalf of the government, testified as follows:—

I am the captain of police at Astoria, Oregon, and have been there for two years. I have heard the tes-

timony of Esther Wood given at this trial. I have seen this woman before in Astoria in the year 1911, at which time she was carrying on her trade of prostitute in a crib; she was there for about two or three months in a house of prostitution.

A. L. LONG, a witness on behalf of the government, testified as follows:—

I am a police officer of the city of Portland and have been such for two years; I remember when Jake Gronich and Joe Albin was arrested. I made the arrest. The defendant Max G. Cohen was in town at that time. I saw the defendant on May 9th and had a talk with him at the police station about Esther Wood and her refusal to testify, and the defendant said to me at that time: "You didn't act much out of that girl yesterday, did you?" I said "No, not much", and he said "You don't get much out of my clients unless you get ahold of them before I do". He said to me, "If you get anything out of my clients, you have to get ahold of them before I do."

It is hereby certified that the foregoing exhibits and evidence contained in this bill of exceptions contain all of the evidence material to the matter to which this exception relates.

UNITED STATES OF AMERICA,

District of Oregon,—ss.

The foregoing Amended Bill of Exceptions contains all the proofs made and evidence adduced and proceedings had, affecting the matters to which ex-

ceptions relate, before me, R. S. Bean, Judge of the District Court of the United States for the District of Oregon; and now, that the foregoing matters may be made a part of the record, the undersigned, Judge of the District Court of the United States for the District of Oregon, doth hereby allow, settle and sign, within the time allowed by the law, and the extension thereof granted by the undersigned, and in conformity with the order of this court, this foregoing Amended Bill of Exceptions, and orders the same to be filed.

Dated the 3rd day of September, 1913.

R. S. BEAN,
Judge of the District Court of the
United States, for the
District of Oregon.

GOVERNMENT EXHIBIT 3

Statement of Esther Wood.

Questions by Mr. MAGUIRE.

Q. Your name is what?

A. Esther Wood.

Q. How old are you?

A. 24.

Q. What has been your place of residence?

A. I refuse to talk any further.

Q. On what ground?

A. Until I see my lawyer.

Mr. MAGUIRE: She has already consulted with him once.

Mr. CANNON: You might question her and find

out why she does not want to testify.

Miss WOOD: I will not speak to you until I see him.

Q. On what ground? Why don't you want to testify? Why don't you want to talk? Have you any reason for not testifying? You understand, Miss Wood, do you not, that this a judicial inquiry and you are now in the presence of a commissioner who has authority under the law to administer oaths and examine witnesses, so that you have been called to the stand and must give some reason for not testifying, other than the fact that you want to talk to your attorney. Did your attorney advise you not to testify?

A. No, sir.

Q. Have you talked with your attorney?

A. Yes, not very long.

Mr. MAGUIRE: If the court please, the witness has talked with her attorney on two different occasions; once in Mr. Pray's office and once in the city jail.

Mr. CANNON: You understand you can be punished for your attitude?

A. Yes, sir.

Q. Do you prefer to be punished and kept in jail rather than testify?

A. Yes, sir.

Q. Very well, then, Miss Wood, this is probably what will happen to you unless you do testify. You will probably have to go to jail for an indefinite time, if you prefer to do that rather than answer simple

questions.

Mr. STEPHENSON: If you please, Commissioner—

....Mr. MAGUIRE: If the court please, I prefer to pursue this inquiry direct and then let counsel do his questioning. If the witness has any privilege she wants to claim, let her claim it herself.

Mr. STEPHENSON: I think under the Federal authorities, the witness is not compelled to testify either for or against this defendant.

Mr. MAGUIRE: Until that develops. If she refuses to testify I can't develop anything.

Q. What is your name?

A. I refuse to talk. I have told you once.

Q How old are you? Do you refuse to answer that? Where have you lived in the last two years? Do you refuse to answer that question also?

A. Yes, sir.

Q. On what ground?

Mr. CANNON: I don't think there is any use pursuing this hearing any further. I think I will—

Mr. STEPHENSON: I would like permission, if your honor please, to ask the witness one question.

Mr. MAGUIRE: If the court please, I object to that. The Government, I think, has subpoenaed this witness, and as she has refused to testify, there is no chance for any cross-examination.

Mr. CANNON: I presume that is technically correct, although I don't care to put an incompetent witness in jail, if she is, as a matter of fact incompetent.

Mr. STEPHENSON: I will ask her, if your honor please—

Mr. MAGUIRE: If the Court please, I object. I am perfectly willing to ask the questions of my witness.

Q. I will ask you again, what is your name?

A. I have told you once.

Q. Your age is 24 years, is that correct?

A. Yes, sir.

Q. Where have you lived in the last two or three years?

A. I refuse to answer any further.

Mr. CANNON: That does not have anything to do with this case.

A. I refuse to answer.

Q. Upon what ground? Why do you refuse to answer? It has nothing to do with this defendant or with this case in any way. As far as I can see, it is purely preliminary. If they ask you a question that you think will compromise you in any way, you may stop. This is a very simple question and I think you ought to answer it, unless you have simply made up your mind to be stubborn.

A. I will answer all the questions as soon as I have seen my attorney. I haven't talked to him. I was very ill. I didn't talk to him.

Mr. MAGUIRE: Her attorney has been notified of the time of the hearing and he has already told Mr. Pray and myself over the telephone that he had advised her to tell the truth about the matter, so there

is no excuse for her attitude.

Mr. CANNON: If she is incompetent, there is no use for me to commit her.

Mr. MAGUIRE: She is not incompetent. I believe counsel's position is this; that she is incompetent to testify against this defendant because there may be a marriage relation claimed between them. (Cases cited, etc.)

Mr. CANNON: I understand that is the rule.

Mr. STEPHENSON: If your honor will allow me to ask the witness a question. Miss Wood, I ask you whether it is a fact or not that you are married to the defendant, Gronich?

A. I will let you know later on.

Mr. CANNON: I will do this. I will take this case under advisement, and this witness will be committed to the county jail pending a decision in the matter, and I don't know just when I will be able to decide it, and her bond will be fixed at $2,500.

Mr. STEPHENSON: Now your honor has fixed the bail in the case of United States v. Albin at $4000; that was temporary.

Mr. CANNON: I fixed his bail yesterday morning at $4000.

Mr. STEPHENSON: Can your honor reduce this bail at this time?

Mr. Cannon: I cannot do it now.

Mr. STEPHENSON: You have not committed this defendant?

Mr. CANNON: No, I have not.

Mr. STEPHENSON: Do I understand the government concludes offering evidence at this time?

Mr. MAGUIRE: No, the case is continued.

Mr. CANNON: Do I understand this is all the testimony you have?

Mr. MAGUIRE: There will be testimony coming from Denver.

Mr. STEPHENSON: If the government intends to conclude at this time, I would like to ask of the Government the reason why he feels this defendant ought to be held to the Grand Jury.

Mr. MAGUIRE: I have not held; I merely took the case under advisement at this time.

Mr. MAGUIRE: I think, if the court please, that I will ask for a continuance of this case pending some decision one way or the other as to her being in contempt, and it may be quite likely she will change her mind when she understands more fully.

Mr. CANNON: I think she will. I will continue the case and you can call it up at any time you see fit.

Mr. COHEN: If the court please, I represent this witness in this case. I don't know what position the government here decides to take in this matter in reference to this witness at all. She has certain rights and must be protected, and I don't intend to let those rights be violated in any way. If the Government desires anything that is pertinent to any issue, I would like to know it and if satisfactory and it does not affect the rights of the witness here, I have no objections. Do I understand, Mr. Cannon, you have

given her general advice in answering questions on the stand regarding anything that might incriminate her in any way, shape, manner or form?

Mr. CANNON: Yes.

Mr. MAGUIRE: Do I understand you want to reopen this case?

Mr. COHEN: I say that openly. I don't take it up with any threats with any contempt proceedings That is not the contention I make, I am doing it for friends.

Mr. MAGUIRE: I just wondered whether you had given your client advice not to answer questions.

Mr. COHEN: Certainly, against the ruling of the court.

Mr. MAGUIRE:

Q. Where have you been—where has been your place of residence your address in the last three years?

A. Cleveland, Ōhio, for the last three years. Not all the time I have been there.

Q. When did you leave Cleveland?

A. I left Cleveland—I don't remember the date.

Q. About how long ago.

A. About five weeks ago.

Q. How long had you been in Cleveland before then?

A. I had been there off and on for the last 5 or 6 years.

Q. Had you ever been out on this coast before?

A. Yes, sir, once before.

Q. Where had you been out here?

A. Why, I have been—

Mr. COHEN: Now, I object—

Mr. MAGUIRE: Now, if the Court please, counsel is not in this case at all. He is not representing this defendant, and he has no place here at all. Counsel's interference is resented and I shall ask the Court for a ruling.

Mr. CANNON: Counsel cannot claim the privilege for her.

Mr. COHEN: I don't understand what position the government is going to take in this matter at all. I simply ask for her privilege. She does not understand it and asks to be represented by counsel. She has a right to advice, I suppose? Has she asked that of the court?

Mr. CANNON: I have advised her that whenever she feels that she is incriminating herself she need not answer.

Mr. COHEN: I want the record to show whether this witness has asked whether she be entitled to counsel.

Mr. MAGUIRE: I object to counsel's statements. He is not in this case at all one way or the other. He is nothing more than a bystander and is interfering with the prosecution of justice. Now, if you will answer my questions, Miss Wood. Do you remember the question?

A. No, sir.

Q. How long were you in Oregon and where did you stay?

A. I have been here—I will tell you the dates in a minute. I have been here about two weeks.

Q. Have you ever been here before?

A. No, sir, not in Portland.

Q. Where at in Oregon?

A. I refuse to answer that question.

Q. On what ground do you refuse to answer that question?

A. I have not been out in this state before, not lately.

Q. How long ago was it you were out here?

A. I do not remember.

Q. 1, 2 or 3 years ago—how long?

Mr. CANNON: Well, go ahead.

Mr. MAGUIRE: Please answer the question, Miss Wood.

A. I don't know—last summer.

Q. Where did you live?

A. At Baker City, Oregon.

Q. Did you ever live here any place in the state?

A. No, sir.

Q. Were you ever in Portland before this last trip?

A. No, sir.

Q. Have you ever been at the Levens Hotel here in Portland before this particular trip?

A. No, sir.

Q. Have you ever been in Portland before?

A. I went by—I didn't stop here.

Q. You know the defendant in this case?

A. No, sir, I do not.

Q. I mean Jacob Gronich.

A. Yes, sir.

Q. How long have you known him?

A. I have known him as long as I have been married to him.

Q. Did you ever know him before?

A. Yes, sir, not very long.

Q. Where did you meet him?

A. Cleveland, Ohio.

Q. Were you ever in Astoria, Oregon?

A. No, sir.

Q. Were you ever in Astoria, Oregon, during the years 1910 and 1911?

A. No, sir.

Q. When in Baker, where did you live—what was your adress?

A. 1797 Auburn Ave.

Q. On what is known as "The Nile" there, isn't it?

A. I don't know.

Q. Did you ever hear of the Nile in Baker, Oregon?

A. No, sir.

Q. Did you practice prostitution in Baker, Oregon?

A. No, sir.

Q. At no time?

A. No, sir.

Q. Have you ever practiced prostitution any place

in the United States?

A. No, sir.

Q. Did you ever rustle?

A. No, sir.

Q. Were you ever in Denver, Colorado?

A. Yes, sir.

Q. When were you there?

A. 2 weeks ago.

Q. Were you there in January of 1912?

A. No, sir.

Q. You weren't in Denver in January of 1912?

A. No, sir.

Q. Did you ever hear of 2030 Market street, Denver?

A. No, sir.

Q. I will ask you if you ever saw this postal card before?

A. No, sir, it is not mine.

Q. Did you ever see it before?

A. No, sir.

Q. I will ask you if you ever saw this postal card before?

A. Yes, sir.

Q. Where did you see it?

A. I think it was Canton, Ohio.

Q. Whose handwriting is that?

A. I don't know.

Q. You don't recognize that as being the handwriting of anyone you ever knew?

A. No, sir.

Q. Did you ever see this postal card on any other occasion or in any other place?

A. Yes, I have seen it, but I don't remember where that is from.

Q. Don't you remember who sent it to you? Where did you get hold of it?

A. Why—

Q. What were you going to say?

Mr. MAGUIRE: I wish the court would advise this witness to speak up.

Mr. CANNON: Please answer, Miss Wood and say whether you ever got it. You know whether it is your or not, don't you? Is that yours? Is that your postal card? Was it sent to you?

A. I refuse to answer.

Q. On what ground?

A. I don't remember.

Mr. MAGUIRE: Isn't it a fact you got that in Denver?

A. I don't remember.

Q. Did you get any mail in Denver?

A. Not since I have been there. Since 2 weeks ago.

Q. You did not get any mail in Denver in January, 1912? Answer that please.

A. I don't remember.

Q. Where were you in January, 1912, more particularly on the 29th day of January, 1912, up to the 10th of February, 1912.

A. I do not remember.

Q. You don't know where you were?

A. I don't remember.

Q. Where did you leave a month ago during April, 1912?

A. In Cleveland, Ohio.

Q. When did you leave Cleveland?

A. I left there; it is about 4 or 5 weeks ago. I don't just remember the date.

Q. And whom did you leave there with?

A. With my husband.

Q. Who is your husband?

A. Jake Gronich.

Q. What is his name?

A. Jake Kramer.

Q. At first didn't you say Green?

A. No, sir, I said Kramer.

Q. I think you said Green.

A. No, sir, I said Kramer. I didn't know anybody by the name of Green.

Q. Do I understand you to say that you don't know anybody by the name of Green? Who is the man you sent that card?

A. I don't remember.

Q. You don't know who it was?

A. No, sir.

Q. You don't know any man by the name of Jake Green? Is the defendant here Jake Gronich, or Kramer, or does he go under the name of Green?

A. No, sir.

Q. Did you ever hear that name at all?

A. No, sir.

Q. Whose handwriting is on this postal card?

A. I don't know. I don't remember.

Q. Look at it. Isn't that your handwriting?

A. No, sir.

Q. Write Esther Wood. Write Jake Green. Now write these words, "That is no lie". Didn't you write that?

A. No, sir.

Q. Look at it again and see if it doesn't look just exactly as you have written it there.

A. Lots of people write the same.

Q. You would swear that you didn't write that?

A. Yes, sir.

Q. You are sure of that?

A. I don't remember the postal.

Q. Whose handwriting is that? Do you swear you didn't write that at all?

A. I don't remember. It hasn't been mailed to me. I don't remember.

Q. Who wrote on this card which is entitled "A little bit of fancy work"?

A. I don't know.

Q. Is that your handwriting?

A. I don't remember.

Q. Does it look like yours?

A. I don't know.

Q. Does it look like yours?

A. I don't remember.

Q. I didn't ask you that. I asked you whether

this handwriting looked like your handwriting. Do you know whether you wrote this or not?

A. No, sir, I don't remember.

Q. Did you ever see that postal card before?

A. I don't remember.

Q. Do you remember seeing that card before?

A. I remember seeing it.

Mr. MAGUIRE: I wish the Court would advise her regarding false swearing.

Mr. CANNON: You must understand that already you are under oath here, and being under oath, you are expected to tell the truth; when you do say anything, tell the truth about it, and if you don't you subject yourself to penalties for perjury and false swearing.

Mr. COHEN: I want to interject, if I may with the Court's permision, that I wish counsel would explain to this woman. She is extremely nervous and suffered last night with hysteria and has had Dr. Ziegler taking care of her. In fact, Mrs. Simmons, the matron of the jail, telephoned to the United States marshal to send a government physician down there. This woman perhaps don't realize what she is saying. I talked with her ten minutes, and she didn't remember what she had said to me, and I think the matter should be used with some discretion. If they are asking this witness for evidence of a certain crime, they should confine it to that certain crime.

Mr. CANNON: She was put on the stand this morning, and said she did not want to testify until

she had talked with her attorney. The case was put over twenty-four hours. If she wants to talk she can talk now. I don't see any way to stop the government—to stop this case now. As a matter of fact she is not entitled to counsel at this time. There is nothing there that entitles her to counsel. She is not charged with any crime. You may proceed with the examination. I got all of this I want.

Mr. MAGUIRE:

Q. Did you ever see this card, and if so, where? Where did you receive it?

A. I don't remember.

Q. Well, you remember seeing this card before, don't you?

A. I don't remember.

Q. You don't remember what? Did you ever see this card before?

A. I don't remember.

Q. Do you understand the question? I am going to ask you another question. Have you ever been in Denver except this trip two weks ago; Denver, Colorado?

A. Yes, sir.

Q. When?

A. I don't remember.

Q. Well, approximately; one week, six weeks, a year or how long ago? Answer the question please.

A. I don't remember.

Mr. MAGUIRE: If the court please, this is absolutely impossible.

Mr. CANNON: About how long ago were you there, as near as you can remember? You have some idea?

A. I was there two weeks ago.

Q. Well, prior to that time, when were you there, or for how long?

A. I was very ill. I was under the doctor's care for 3 weeks.

Mr. MAGUIRE: What year was that in, do you remember?

A. That was two weeks ago.

Q. Was that the only time you ever were in Denver? You know whether you were in Denver before that or not?

A. I refuse to answer that question?

Q. Why so? Why do you refuse to answer that?

Mr. MAGUIRE: I can't make the witness—I can't speak for the witness. I decline to pursue the investigation any further.

Mr. CANNON: I will ask you a few questions myself.

Miss Wood, have you ever practised prostitution any place at any time? Yes, or no. I don't ask for any details, just whether you did or not. Just yes or no.

A. I refuse to answer that question.

Q. Upon what ground? Have you any reason for declining to answer that question? So far as I can see, I can say this much to you. That question does not intend to incriminate you in any way. I do not

ask you whom you committed adultery with, but I want to know whether you practiced prostitution at any time in any place. You decline to answer that do you? I don't see how there is any chance to make any headway here.

Mr. MAGUIRE: I renew my motion.

Mr. CANNON: Have you any further evidence?

Mr. MAGUIRE: No further evidence this afternoon. There is one or two questions that I believe I will ask the witness.

Q. How long have you known this Jacob Gronich?

A. Since I have been married to him.

Q. Well, how long has that been?

A. A little over two years.

Q. Where were you married to him?

A. Cleveland, Ohio.

Q. At what time of the year?

A. It was in December.

Q. And before whom and by whom were you married?

A. In the court house.

Q. What court house?

A. The county court house, by the squire.

Q. Do you remember his name?

A. I do not remember it.

Q. Do you remember who were the witnesses?

A. Yes, one of the clerks.

Q. Under what name were you married?

A. Under the name of Kramer.

Q. You gave your name as what?

A. Grace Reimers.

Q. And what name did this defendant use?

A. Kramer.

Q. What was the first name?

A. Jacob.

Q. How did he spell it?

A. J-a-c-o-b.

Q. I mean Kramer?

A. K-r-a-m-e-r.

Q. Who else was a witness besides the clerk of the court?

A. That was all.

Q. Had you ever been married before?

A. No, sir.

Q. You say the judge married you there?

A. Yes, sir.

Q. You are sure it was in December?

A. Yes, sir.

Q. You are positive as to that?

A. I am pretty sure.

Q. What day in December?

A. The 10th day of December.

Q. Is Jacob Kramer the defendant's right name?

A. No, his right name, I think, is Jacob Gronich. His people are Jewish and I am a Gentile. His people did not want him to marry me.

Q. Where are these people—his people?

A. I do not know.

Q. When did you leave Cleveland?

A. I left Cleveland five weeks ago.

Q. And who came with you?

A. My husband.

Q. Anyone else in the party?

A. Yes, sir.

Q. Who?

A. I think a lady and a gentleman. I do not know who they were. They did not leave with us. They were on the train.

Q. What are the names of this lady and gentleman?

A. Her first name is May. That is all I know.

Q. What is his name?

A. I don't remember.

Q. Do you know his first name?

A. I think she called him Joe. I remember once she called him Joe.

Q. What did you call him when you talked to him?

A. I never spoke to him.

Q. And how far did this couple accompany you and Mr. Gronich?

A. To Portland.

Q. Did you stop any place on the way?

A. I was very ill in Denver.

Q. Had you stopped any place before reaching Denver?

A. No, sir.

Q. Where did you stay in Denver? At what hotel? What is the name of the hotel?

A. I don't remember.

Q. You don't remember the name of the hotel?

A. No, sir.

Q. Was it the Bush or Rush hotel? Does that sound like it?

A. Yes, sir, that sounds like it.

Q. It was something like that?

A. I don't know; I was ill at the time.

Q. Did you practice prostitution in Denver?

A. No, sir.

Q. Did you go out with any other men?

A. No, sir, I was very ill.

Q. You were under the doctor's care all the time you were there?

A. Yes, sir.

Q. I will show you a photograph and ask you if you ever saw that before?

A. Yes, sir. Those are the same people that were on the train with us.

Q. That is your photograph?

A. The top one.

Q. Who is this?

A. That is the lady I met on the train.

Q. You are sure you met her on the train?

A. I met her once in Cleveland.

Q. Where did you meet her in Cleveland?

A. On the street.

Q. Who introduced you to her? How did you come to meet her?

A. My husband.

Q. Didn't you meet these people in Hot Springs,

Ark? That woman and that man?

A. I don't remember.

Q. Were you ever in Hot Springs, Arkansas, yourself?

A. Yes, sir.

Q. When?

A. I don't remember just when.

Q. Well, how long ago? I am only asking approximately.

A. Last spring.

Q. A year ago?

A. Yes, sir.

Q. Didn't you meet this woman, May, and this man in Hot Springs, Ark. when you were there at that time?

A. I seen her there. That is all I remember.

Q. Where did you see her there and under what circumstances?

A. I remember once seeing her on the street.

Q. And who introduced you to her? If you were introduced.

A. I was not introduced at that time.

Q. Didn't speak to her there?

A. I don't remember.

Q. How do you know you saw her there? How do you know you saw her there?

A. Because I saw her in Cleveland?

Q. Did you see this man that was with this woman in Hot Springs?

A. I don't remember.

Q. You would certainly remember if you saw them, wouldn't you? You would remember that, wouldn't you? Who got the ticket for you and your husband to travel West?

A. I don't remember.

Q. Did you buy it? Did you buy the ticket?

A. I don't remember.

Q. Did you ever see that ticket before?

A. Yes, sir.

Q. Where did you see it?

A. That was the ticket we traveled on.

Q. Whose signature is that on the line marked "Purchaser" for self and party?

A. It is not my signature.

Q. I asked you whose signature it was. Is that your husband's?

A. I think it must be.

Q. Whose is this signature right opposite No. 2645, the words "J. Gronich"? Isn't that your husband's? Look at it carefully.

A. It must be.

Q. And you recognize that to be his, don't you?

A. Yes.

Q. Now, you didn't buy that ticket did you?

A. No, sir.

Q. Your husband bought it, didn't he?

A. Yes, sir.

Q. Where did he buy it?

A. Cleveland, Ohio.

Q. How much did he pay for it?

A. I don't know.

Q. You traveled with him on that ticket, didn't you?

A. Why yes.

Q. You came from Cleveland, Ohio, to Portland, Oregon, did you not?

A. Yes, sir.

Mr. MAGUIRE: The government rests.

Mr. STEPHENSON: We have no testimony to offer, your honor.

Mr. CANNON: Do you want this case continued?

Mr. MAGUIRE: I think it would probably be best to have it continued a week—two weeks, in order to bring testimony out here from Cleveland and Canton, Ohio.

Mr. CANNON: Very well.

Mr. STEPHENSON: That is a long time, your honor, on the showing made here, to hold this man two weeks.

Mr. CANNON: This witness is very unwilling to testify. You don't need to be told that. I will grant the continuance.

Mr. STEPHENSON: I think the bail ought to be lowered, since the Government is going to hunt for testimony, as it has none now, and asks for two weeks more time to go on a fishing trip for new evidence, and there is no prospect of getting anything except prostitution in Cleveland.

Mr. MAGUIRE: Under the circumstances, I will ask that the bail be increased. Probably this is the

most flagrant case that has yet come before the government or the Commissioner.

Mr. STEPHENSON: Where the evidence is small the bail should be increased?

Mr. CANNON: You forget there was some evidence the other day from the lips of the other girl, May Swindle.

Mr. STEPHENSON: Maybe I don't recall that.

Mr. CANNON: I do.

Mr. STEPHENSON: Will your honor please indicate.

Mr. CANNON: Her testimony was to the effect that both she and this girl practiced prostitution in Cleveland; that they came here and were in a house, not exactly a house of prostitution, but a house of that nature, and that that was their business. The practising of prostitution was their business. The inference was pretty strong that they came here to practice prostitution, and so is the testimony of the officers as to the conduct of these two men at the time of their arrest.

Mr. STEPHENSON: Does the government expect it will be able to show this woman practiced prostitution here?

Mr. CANNON: Attempted to practice it here.

Mr. MAGUIRE: The defendant brought her here for that purpose.

Mr. STEPHENSON: Of course, if they can prove that, then my remarks go for nothing. If they are

going to get that testimony back in Cleveland, I think they ought to bring it.

[Endorsed]: Bill of Exceptions. Filed Sep. 16, 1913.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 26 day of September, 1913, there was duly filed in said Court, a Stipulation, in words and figures as follows, to wit:

[Stipulation as to Bill of Exceptions.]

In the District Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MAX G. COHEN,

Defendant.

At the trial of the above entitled defendant, certain postal cards were introduced by the Government and regularly marked as Exhibits. These postal cards having been received in evidence, they are now missing from the files of the case, and after a strict search, cannot be found. For the purpose of establishing the identity of said postal cards and the contents of the same, it is now STIPULATED that two of said postal cards were written by Jake Gronich to the witness Esther Wood and the third was written by the witness Esther Wood to the said Jake Gronich; that

each of these postal cards tended to show a familiarity between the said witness Esther Wood and the said Jake Gronich; that these postal cards showed upon their face that they were transmitted through the United States mails and postmarked at approximately the time that is charged in the indictment when the defendant Gronich transported the said witness Esther Wood from Denver, Colorado to Portland, Oregon.

Dated at Portland, Oregon, September 26, 1913.

CLARENCE L. REAMES,
Attorney for Plaintiff.
THOMAS MANIX,
Attorney for Defendant.

[Endorsed]: Stipulation. Filed Sep. 26, 1913.
A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 29 day of September, 1913, there was duly filed in said Court, a Petition for Writ of Error, in words and figures as follows, to wit:

[Petition for Writ of Error.]

In the District Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA,
vs.
MAX G. COHEN,
Defendant.

Now comes Max G. Cohen, defendant herein, and

says that on or about the 2d day of June, 1913, and from day to day thereafter, up to and including the 4th day of June, 1913, the said Max G. Cohen was tried for the crime of subornation of perjury before the Hon. Robert S. Bean, judge of the said court, and on the said 4th day of June, 1913, was found guilty by the jury, and thereafter sentenced by the court; and the said Max G. Cohen says that in the said trial, proceedings and judgment had in the above entitled case, certain errors were committed to the prejudice of this defendant, all of which will appear more in detail from the Assignment of Errors which is filed with this petition.

WHEREFORE this defendant prays that a writ of error may issue on his behalf out of the United States Circuit Court of Appeals for the Ninth Circuit for the correction of errors as complained of; and that a transcript of the record, proceedings and papers in this case, duly authenticated, may be sent to the said Circuit Court of Appeals.

RALPH E. MOODY,
ROSCOE C. NELSON,
THOMAS MANNIX,
Attorneys for Defendant.

[Endorsed]: Petition for Writ of Error. Filed Sep. 29, 1913.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 29 day of September, 1913, there was duly filed in said Court, Assign-

ments of Error in words and figures as follows, to wit:

[Assignments of Error.]

In the District Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA,

vs.

MAX G. COHEN,

Defendant.

Now comes the defendant, Max G. Cohen, and in connection with his petition for a writ of error, makes the following assignment of errors which, he avers, occurred upon the trial of the above entitled cause, to-wit:

I.

The court erred in overruling the demurrer to the indictment, said demurrer being based upon the following grounds:

1. That more than one crime is attempted to be charged in said indictment, said indictment consisting of one count.

2. That the said indictment fails to state facts sufficient to constitute a crime.

3. That the facts stated in the indictment do not constitute a crime.

II.

The court erred in refusing the motion of the defendant for an order directing the jury to return a verdict of not guilty in the above entitled cause, upon the

following grounds, and for the following reasons, to-wit:

1. That no evidence had been introduced in the trial of said cause upon which a verdict of guilty could be based.

2. That the evidence which has been introduced in this cause was not sufficient to be the basis of a verdict of guilty.

3. That the evidence failed to show that any crime had been committed by this defendant.

4. That the evidence was not sufficient to show that the defendant had committed the crime set forth in the indictment in this cause.

The indictment charges that on or about the 7th day of May, 1912, the defendant Max G. Cohen "did unlawfully, knowingly, feloniously, and corruptly procure, advise, obtain and suborn one Esther Wood to appear as a witness at the trial and hearing of said cause for the United States and to give in evidence before the said United States Commissioner, certain matters material and relevant to the issue in the substance and to the effect following, to-wit: That she the said Esther Wood had never practiced prostitution in Baker, Oregon, and that she, the said Esther Wood had never practiced prostitution in Portland, Oregon, or in Denver, Colorado, or in any other place in the United States, and that the said Esther Wood did not remember having ever received certain postal cards theretofore sent to her by the said defendant Jake Gronich, and that she did not remember or recol-

lect having written or mailed certain postal cards sent to and received by the defendant Jake Gronich."

In regard to the allegations that Esther Wood was suborned by the defendant to appear and perjure herself as alleged, Esther Wood had not been arrested at the time when the defendant is charged with the crime set forth in the Indictment, and no evidence is introduced that she knew she would be arrested.

Esther Wood in testifying what took place in the room at the Oxford Hotel when the government claims that Esther Wood was suborned, testified as follows:

"I saw Mr. Cohen on May 7th at the Oxford Hotel in Miss Heller's room, about a quarter after five. When he came in, I was in the room with Sadie Parker, Rose Heller, and Violet Woods. I wasn't quite sure who sent for him. When he came in I was lying on the bed feeling bad and crying, and as he entered he said, 'Well, well, what is this all about?' and Sadie Parker told him that I was the girl with the two Jewish fellows who had been arrested at the Levens Hotel, whereupon Mr. Cohen mentioned Gronich and Albin, and said he had seen them that morning and that they had been turned over to the Government, and were represented by Dawley, a negro lawyer with whom Cohen said he declined to be connected. Then Cohen asked me if I was married to Jake Gronich, and I hesitated about answering, but Sadie Parker told me that Mr. Cohen was my lawyer, and that I should tell him the truth, and I then told him that I was

married, and had been in Portland a little over a week. I told him that I had sported in Portland one day, and he said, 'Oh well, they won't find that out.' Sadie Parker then told Mr. Cohen, calling him by his first name, that I had worked for her a little over two weeks the preceding winter, and Mr. Cohen told Sadie that she wouldn't have to tell that. Then he said, 'They have to prove that she is a sporting girl.'

Page 48. Mr. Cohen then asked me whether I had any telegrams or letters in my trunk, and I told him that I didn't have any; that all I had consisted of postal cards at different places where I had worked, and he told me, 'Well, if they should show you those, just say you don't remember.' Mr. Cohen asked me if I came direct from Cleveland here, and I told him that May and I had stopped in Denver and had a sporting house together, and Sadie Parker said that if they scared May, she would tell the truth and get me up for perjury, and I asked the meaning of perjury, and Sadie Parker said to tell a lie. And Mr. Cohen said, 'She can deny that she ever sported', and then he said that when they took me down I should see May, because if May told that she and I had sported together, I could say that I did sport, but that I was not brought here for immoral purposes, and when I sported I did it of my own free will; and if May didn't tell I could deny that I sported.

Page 49. Sadie Parker then asked Mr. Cohen if he didn't think it best for me to leave town so that they could not get me, and Mr. Cohen said no, that I might

as well go down and give myself up; that they were bound to get me. Then Mr. Cohen said, 'Now I will give you my card, and in case they do take you, call me up no matter what time it is; you call me up when they come down to take you', and he wrote down his phone number and gave me his card.

Page 50. I told him I had some postal cards in my trunk from different places where I had sported, and he said, 'When they show you, then just say that you don't remember.' He went away just before six, leaving his card, and saying that he had his machine and was going home to supper. I was arrested late that same night about half past ten at the same room in the Oxford Hotel, and was taken to the city jail. Mr. Cohen told me at that time that he had a good stand in with the Government people, and he mentioned the name of assistant district attorney Evans. I told Mr. Cohen at that time that I had practiced prostitution in Baker, Oregon, and also in Denver, Colorado, and that May and I had had a house together."

In cross examination Esther Wood testified as to what took place at the Oxford Hotel on the night it is claimed the defendant suborned her, as follows:

"Page 61. The first time that I ever met Mr. Cohen was at the Oxford Hotel, May 7th. I didn't know him at all before that time. He was there from 5:15 to just before six. It was before six when he left because the girls said they had an engagement to supper at six. Mr. Cohen was there over half an hour,

but not for an hour. I didn't send for him, or request that he be sent for and am not sure who sent for him because I remained in the room. I heard Rose Heller, the girl I stayed with that night at the Oxford, talk about an attorney, but I didn't know she had sent for one. She was there when Mr. Cohen was, and I think but I am not sure, that she sent for him. I talked to him because, just before he came in, I heard one of the girls say they would call him on the phone, and when he came I didn't know he was for me, but they said they would call a lawyer at the telephone, and I was laying on the bed rather sick, and he came in, and Sadie Parker talked to him first, telling him I was the girl with the two Jewish fellows taken out of the Levens Hotel. I said nothing at the time, and Mr. Cohen said he had seen them, referring to the two men who had been arrested that morning, and that they were turned over to the government, and Sadie Parker and she knew that. Mr. Cohen then turned around and said, 'Why this May is married to this Joe Albin.' I had not known that before. He then asked was I married to Jake Gronich, and those were his first words to me. I hesitated to answer, but I told him I was married after Sadie Parker told me that he was my lawyer, and that I should tell him the truth.

Page 65. I had not been arrested at that time. I was arrested that same night about 10:30. (May 7th). I retained Mr. Cohen that afternoon as my lawyer. I paid him nothing for his services. Sadie Parker told

him we were down and out; we didn't have any money, but she would go around among the Jewish people and pick up a collection, and she would pay him. I didn't know whether he was paid anything or not. He asked me once at the city jail if I had any money, and I told him no, but I told him if I did get out that I would pay him. He said, 'That is all right; I am not worrying about that; that is all right.' I told him I was married to Jake Gronich. I told him at that time I had been practicing prostitution in Portland, in Baker City, Denver, Colorado, and Cleveland, Ohio. How I happened to tell him this was that when Sadie said that if they scared May, she would tell everything, and I told him, 'Yes, I worked with her back east.' But he said, 'Well, when you see her, then if she should tell that, then you tell that he didn't bring you here for immoral purposes, and that you did it of your own free will. If she doesn't tell it, deny you sported. That is the only way to save him because they found the receipts, the railroad tickets, right in his pockets."

Rose Heller in testifying what took place in the room at the Oxford Hotel, when the Government claim that Esther Wood was suborned, testified as follows:

"I remember the night her husband, Jake Gronich, was arrested. Esther Wood at that time was off with me. We were to a show, and separated about one o'clock in the morning. She came back between two and two thirty about, in a taxicab, to room 3 in

the Oxford Hotel, which is my room. She stayed with me a whole night and the next day. This is the first time I have ever seen Mr. Cohen since I got him for Esther Wood. I got him for Esther Wood about the night after Jake was arrested. Mrs. Levens telephoned me and told me to go and get Mr. Cohen. I went to Mr. Cohen's office and left my name with the stenographer; he came down that afternoon to the Oxford, room 3. When he came into the room, there was Sadie Parker, Violet Woods, Esther Wood and myself there. It must have been between four and five o'clock in the afternoon. He stayed about ten or fifteen minutes. After Mr. Cohen came in he asked Esther Wood what the trouble was, and she told him that a man was arrested, and he said he knew all about it. Then she asked him if he wanted to be her attorney. He said yes, but he knew that Jake had got another lawyer, and he would not mix in. Esther Wood said she sported in Baker and Astoria, that is all, and then Sadie Parker spoke up and said, 'She worked for me one day up in my house.'

Page 103. Q. Was anything said by Mr. Cohen as to what Esther Wood should say in regard to her having practiced prostitution?

A. Well, he told her to say that she didn't sport.

Q. Was anything said about May Swindle?

A. No, I didn't hear nothing about it.

On cross examination, Rose Heller testified in substance as follows:

Page 103. I am held as a witness in this case, also

for Jake Gronich. I wasn't put in jail. I testified in this case.

After Mr. Cohen first came into the room, the first thing that happened was that Esther Wood asked him if he could not be her attorney, and he said he could not take the case for Jake Gronich had got another lawyer. She asked him if he could be Jake Gronich's attorney. Mr. Cohen said, 'Well', he said, 'if they will discharge this other lawyer he will take the case.' Esther cried, and I told her not to cry, that everything would be all right; and then she wanted to run away. Mr. Cohen said, 'You better stay here, for' he said, 'it is no use to run away. You might as well go to the court and give yourself up.' Then there was a whole bunch of them in the room; they were talking all kinds of language, and I don't know what they said. Esther said she sported in Baker and Astoria, and worked here for Sadie one day. I don't remember how she happened to tell Mr. Cohen about that. She told Mr. Cohen herself she was married; Mr. Cohen didn't ask her. Mr. Cohen didn't ask her whether she had been sporting. I didn't hear anything about Denver. But just those two towns, Baker and Astoria that is all. After she told him that, Mr. Cohen said, 'You don't have to say that; they won't find that out.' He told her not to say that she had been sporting. I can't remember his exact language. The only words that I remember are that she said she was sporting in Baker and Astoria, and here one day for

Sadie Parker. Those few words I remember, and Cohen said 'You don't have to say you sported', he said, 'they won't find you out.' At that time Esther had not been arrested, and nobody knew that she would have to testify any place. Esther knew that she was going to be arrested because she heard that Gronich was,—that the government had got in, so she knew that there was no chance for her to run away. I do not remember hearing Esther Wood in that conversation say anything about anything else."

Violet Woods, testifying about the matters occurring at the room in the Oxford Hotel on the night in question, testified as follows:

"I live at the Levens Hotel, and my occupation is a sporting girl. I am acquainted with the defendant, Max G. Cohen. I have seen him once, that was the day after Gronich's arrest, either May 6 or 7, 1912. I was in Rose Heller's room before he came in, Rose Heller, Esther Wood and Sadie Parker were also there. It was some time after five o'clock before he arrived. I think he stayed about half an hour. I don't know whether Sadie Parker or Rose Heller called for him. Esther Wood was on the bed crying, and Mr. Cohen said, 'What does this mean, and what is this about?' Sadie Parker says, 'She is the girl of the two fellows that were taken last night.' Mr. Cohen said, 'Yes, I just came, I was up there and saw them turned over to the marshal' and he said, 'they have a colored lawyer.' Sadie Parker asked if he could do anything. He asked Esther if she was mar-

ried, and Esther hesitated, and she didn't want to say anything, and Sadie Parker said, 'Esther you can tell Max because he is your lawyer, and he can see what he can do for you', and Esther didn't want to tell him anything at first, and finally we told her, all of us, 'Go ahead, tell Max Cohen; maybe he can do something for you.' Esther started to tell about her case, and she said, 'We came here with this May and this Joe,' and he said, 'Yes, I know, I have heard May was married to him', and Esther spoke up and said, 'Is that so?' She was kind of surprised, and he said, 'Yes I think she said she was married', and so Sadie Parker handed Esther $3.00 and she said I would give her $5. and we would see if we could not get her away from here. Mr. Cohen said that would not do; 'It is no use for her to go away' as we asked him if that would not be best. He said, 'No, I wouldn't advise her to go away; if she goes away she might just as well give herself up to the government, go up and give herself up.' He said, 'She has no chance to get away', and Esther had told him the different places where she had been, and she told him where she had sported one day here. She said about these different places, 'What will they do if they find out?' And Mr. Cohen said, 'Well, have you sported since you have been back?' She said, 'Yes I have sported one day on Third Street since I have been back'. Sadie Parker then said, 'She worked for me last year about Christmas day, something like that', and he said, 'They won't find that out; you can say you were

rooming there' and Sadie Parker said, 'She has been at Astoria', and Esther Wood spoke up and told Mr Cohen that when she was on her way out here she had a house with May in Denver, and she said she was here last year in Baker City, and sported in Astoria and Portland since she came back, and he said, 'They will have to prove you have been sporting; I don't think they can find out.' And Esther Wood said, 'What will I do if they do find out?' He said, 'Well, if they do find out, May has told you have (been sporting) just find out she has told. They might scare you and tell you, but find out for yourself. Then you can say you did it of your own accord, but your husband didn't know anything about it, and if she tells you have been sporting, say that Jake didn't know anything about it', that she had done it of her own free will, and if May didn't tell, Mr. Cohen told her to deny that she had ever been sporting.

Page 118. Mr. Cohen asked her if she had any letters or telegrams in her trunk and she said she didn't know whether she had any letters or telegrams or not, but thought she had some postals that Jake sent her, and that they were in Jake's handwriting, and Mr. Cohen said, 'Well, if they show you those postals, you can say you don't remember anything about them; you don't remember them.' "

On cross examination Violet Woods, so far as material to this exception, testified as follows:

"There were five of us in the room including Mr. Cohen, and all the conversation was held openly in

the presence of everybody. Mr. Cohen asked Esther first how long she had been back, and she said just a few days, and he asked her had she been sporting since she came back, and Esther didn't want to say anything. After that Esther started to tell him that she came out here with May and Joe Albin. I told Mr. Cohen I was down in Astoria and Esther was sporting there, and Mr. Cohen said, 'Well, they can't find that out; they will have to prove it.' And Esther asked what she should do if May told they had had a house in Denver, and Mr. Cohen said that she should find out first that May had told, and if May had told, that she could say that she did it without her husband's knowing it and of her own free will; and that if May didn't tell, she could deny she had been sporting. He told her twice she could deny it. At that time Esther Wood had not been arrested and nobody had seen her."

The other conversations between Esther Wood and the defendant taking place after her arrest as she claims, are uncorroborated by any other testimony.

III.

The court erred in allowing to be introduced by the Government the complaint against Jacob Gronich filed in the preliminary hearing before Commissioner Anderson M. Cannon, said complaint being Government's Exhibit 1, reading as follows:

UNITED STATES OF AMERICA,

District of Oregon.—ss.

Complaint for violation of White Slave Traffic Act.

THE UNITED STATES,

vs.

JAKE GRONISH

Before me, the undersigned, a United States Commissioner for the District of Oregon, personally appeared this day Charles P. Pray, who, on oath deposes and says that the said Jake Gronich on or about the 8th day of April, 1912, at Cleveland in the State and District of Ohio, did unlawfully, knowingly and feloniously procure and obtain a ticket and tickets and form of transportation and evidence of right thereto to be used in interstate commerce by a woman, to-wit, Esther Wood in going from the said Cleveland, in the State of Ohio to Denver in the State of Colorado, and from the said Denver in the State of Colorado to Portland in the State and District of Oregon and within the jurisdiction of this court, for the purpose of prostitution and debauchery and for an immoral purpose, towit: that she, the said Esther Wood should live with him the said Jake Gronich, as his concubine, whereby the said woman, to-wit Esther Wood was transported in interstate commerce from Cleveland in the State of Ohio to the City of Denver in the State of Colorado and from the said Denver in the State of Colorado to Portland in the State and District of Oregon, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

And furthermore the said deponent says he has reason to believe, and does believe that Esther Wood

and May Swindle alias May Weller are material witnesses to the subject matter of this complaint.

CHARLES P. PRAY.

Subscribed and sworn to before me this 7th day of May, 1912.

A. M. CANNON,
United States Commissioner.

The said complaint was immaterial to the issue involved in this cause; and is further immaterial on the ground that there is nothing therein contained showing the materiality of the testimony given at the said preliminary hearing by the government's complaining witness, Esther Wood, and it does not appear in what respect or in what manner the testimony of said witness was material to the issue involved in the preliminary hearing before Commissioner Cannon, nor was there any evidence introduced to show the materiality of the same, in the above entitled trial, the issue to be determined at said hearing being whether the government had probable cause to hold Jake Gronich on the charge of the violation of the White Slave Traffic, and although the indictment charges that the defendant suborned Esther Wood to give false testimony at the trial, the record shows that the hearing before the United States Commissioner Cannon to determine whether Jake Gronich should be held for violating the White Slave Traffic Act was not a trial in the proper sense of the word.

IV.

The court erred in the admission of testimony of-

fered by the Government in the following instance, to-wit: the testimony given by Esther Wood at the preliminary hearing before Commissioner Cannon to the effect that she did not practice prostitution in Baker, Oregon, in Portland, Oregon, Denver, Colorado, or anywhere else in the United States; and further testimony given at the trial of the above entitled cause, at which trial the said Esther Wood testified in substance, so far as relevant, as follows:

"I have lived in Baker City, Ore., Denver, Colorado, Cleveland, Ohio, Astoria, Oregon, and Portland, Oregon and I have practiced prostitution in all these different places. At the preliminary hearing on the complaint against Jake Gronich before Commissioner Cannon, I was asked whether I had ever practiced prostitution at Baker, Denver or Portland, or any other place in the United States, and I answered no, whereas, as a matter of fact, I had practiced prostitution in the said places."

There was no evidence introduced at the trial to show that this testimony was material to the issue raised at the hearing before Commissioner Cannon on the said complaint against Jake Gronich for violation of the White Slave Traffic Act.

V.

The court erred in allowing the introduction of certain postal cards by the government, marked Government's Exhibits 4, 5 and 6 at the preliminary hearing before United States Commissioner Cannon, at which hearing Jake Gronich was charged with viola-

tion of the White Slave Traffic Act. Esther Wood testified in substance that she did not remember having ever received certain postal cards theretofore sent to her by the said defendant, Jake Gronich, and that she, the said Esther Wood, did not remember or recall having written or received certain post cards sent to and received from the said defendant, Jake Gronich. Her testimony, so far as relevant, is in substance as follows:

"At the preliminary hearing before United States Commissioner Cannon they exhibited to me the card, Gov. Ex. 4. This card was sent to me from Canton, Ohio, by Jake Gronich, and I got it at Denver, Colo. I don't remember just when. Another card, Gov. Ex. 5, was exhibited to me at the preliminary hearing. Jake Gronich sent this card to me, and I got it in Portland. At the preliminary examination before United States Commissioner Cannon, they asked me if I had ever seen this card, and I remember saying once no, and again that I didn't remember. At the time I so testified I did remember seeing the card before, and I knew that I was swearing falsely, but so testified because my lawyer advised me to. As to Gov. Ex. 6, at the preliminary hearing, before U. S. Commissioner Cannon, they asked me if Jake Green sent me this postal card, and asked me if I knew any fellow named Jake Green, and I said no, and they asked me if he sent it to me, and I said no and again that I didn't remember. At the time I did remember. A card was exhibited to me which was in my own

handwriting, and they asked me if it was my handwriting and I said no, and they asked me again, and I said I didn't remember; and they asked me had I ever seen the card before, and I told them that I didn't remember. And at the time I so testified I knew I had seen it before, and I did remember, and I so tstified because my attorney advised me to."

Because of the loss of the postal cards herein mentioned the following stipulation was entered into between the parties:

In the District Court of the United States for the District of Oregon.

STIPULATION.

UNITED STATES OF AMERICA,

v.

MAX G. COHEN,

Defendant.

At the trial of the above entitled defendant, certain postal cards were introduced by the government and regularly marked as exhibits. These postal cards having been received in evidence, they are now missing from the files of the case, and after a strict search cannot be found. For the purpose of establishing the identity of said postal cards and the contents of the same, it is now stipulated that two of said postal cards were written by Jake Gronich to the witness Esther Wood and the third was written by the witness Esther Wood to the said Jake Gronich; that each of these postal cards tended to show a familiarity be-

tween the said witness Esther Wood and the said Jake Gronich; that these postal cards showed upon their face that they were transmitted through the United States mails and postmarked at approximately the time that is charged in the indictment when the defendant Gronich transported the said witness Esther Wood from Denver, Colorado, to Portland, Oregon.

Dated at Portland, Oregon, September 26, 1913.

CLARENCE L. REAMES,
Atty. for plaintiff.

THOMAS MANNIX,
Atty. for defendant.

There was no evidence introduced at the trial of the above entitled cause between the United States Government and Max G. Cohen, to show in what respect or in what manner the testimony in regard to the foregoing post cards was material to the issue involved in the preliminary hearing before commissioner Cannon between the U. S. Government and Jake Gronich; nor was there any evidence introduced to show the materiality of the same in the above entitled trial.

VI.

The court erred in admitting the testimony of Esther Wood to the effect that she swore falsely in reference to her prostitution, in the preliminary hearing before the United States Commissioner Cannon wherein Jake Gronich was charged with violating the White Slave Traffic Act, as well as to the effect that she swore falsely relative to the postal cards introduced in evidence and marked Gov. Exs. 4, 5 and 6,

for the reason that she, the said Esther Wood, was the wife of Jake Gronich, and for that reason her testimony against Jake Gronich was incompetent. In so far as relevant, Esther Wood testified as follows, in substance:

"I lived in Baker City, Oregon, Denver, Colorado, Cleveland, Ohio, Astoria, Oregon and Portland, Oregon, and I have practiced prostitution in all these different places. At the preliminary hearing on the complaint against Jake Gronich before U. S. Commissioner Cannon, I was asked whether I had ever practiced prostitution in Baker or Denver or Portland or any other place in the United States, and I answered no, whereas, as a matter of fact I had practiced prostitution in the said places, and I gave such testimony falsely because the defendant Max G. Cohen, had advised me so to do."

In regard to the postal cards, Esther Woods testified in substance as follows:

"At the preliminary hearing before United States Commissioner Cannon, they exhibted to me a card, Gov. Ex. 4. This card was sent to me from Canton, Ohio, by Jake Gronich, and I got it at Denver, Colorado, I don't remember just when. Another card, Gov. Ex. 5, was exhibited to me at the preliminary hearing. Jake Gronich sent this card to me and I got it in Portland. At the preliminary examination before U. S. Commissioner Cannon, they asked me if I had ever seen this card, and I remember saying no, and again that I didn't remember. At the time

I so testified I did remember seeing the card before and knew that I was swearing falsely, but I so testified because my lawyer advised me to. As to Gov. Ex. 6, they asked me at the preliminary hearing if Jake Green sent me this postal, and asked me if I knew any fellow named Jake Green, and I said no, and they asked me if he sent it to me, and I said once no, and again that I didn't remember. At the time I did remember. A card was exhibited to me which was in my own handwriting, and they asked me if it was my handwriting, and I said no, and they asked me again and I said I didn't remember, and they asked me had I ever seen the card before, and I told them I didn't remember and at the time I so testified I knew that I had seen it before, and did remember, and I so testified because my attorney advised me to."

It also appeared from the testimony that Esther Wood had been married to Jake Gronich at Cleveland, Ohio, Dec. 10, 1910, and that at the date of the trial of the above entitled cause, the said Jake Gronich and Esther Wood were still husband and wife and had never been divorced.

VII.

The court erred in giving the following instruction:—

Now it appears, or there is evidence tending to show that Esther Wood was the wife of Gronich at the time of his arrest and had been for some time prior thereto. That would not excuse him from a violation of the white slave traffic act. No man has

a right to transport his own wife from one state to another for the purpose of prostitution, so the fact that she was his wife would be wholly immaterial upon that inquiry or upon this.

VIII.

The court erred in giving the following instruction:

Now something has been said about the manner in which Miss Wood was treated before the Commissioner. Now, I do not think that is very material in this case. If she was sworn and testified as a witness in that case and knowingly and wilfully testified falsely, she committed perjury, and that is about all that is necessary to be said about that matter. It is one of the facts in the case and you have a right to weigh it along with all the other testimony in the case; but however badly she may have been treated or however wrongly she may have been treated would be no justification or excuse on behalf of this defendant if, as a matter of fact, she committed perjury at his request or his instigation.

The evidence shows that Esther Wood was married to Jake Gronich at Cleveland, Ohio, on the 10th day of December, 1910, and that she was the wife of Jake Gronich at the time of the preliminary hearing before U. S. Commissioner Cannon, at which hearing Jake Gronich was complained of for violation of the White Slave Traffic Act. At the said hearing the said Esther Wood was subjected to threats of imprisonment unless she testified at the said hearing against

the said Jake Gronich, as appears from Gov. Ex. 3 attached to the bill of exceptions.

At the preliminary hearing appears from the record, Gov. Ex. 3, p. 2, in the testimony of Esther Wood:—

Mr. CANNON: You understand you can be punished for your attitude?

A. Yes, sir.

Q. Do you prefer to be punished and kept in jail rather than testify?

A. Yes, sir.

Q. Very well then, Miss Wood, this is probably what will hapen to you unless you do testify. You will probably have to go to jail for an indefinite time, if you prefer to do that rather than answer simple question.

* * * *

Mr. MAGUIRE: Q. What is your name?

A. I refuse to talk. I told you once.

Q. How old are you? Do you refuse to answer that? Where have you lived in the last two years? Do you refuse to answer that question also?

A. Yes, sir.

Q. On what ground?

Mr. CANNON: I don't think there is any use in pursuing this hearing any further. I think I will—

Mr. STEPHENSON: I would like permission, if your honor please, to ask the witness one question.

Mr. MAGUIRE: If the court please, I object to that. The government, I think, has subpoenaed this witness, and as she has refused to testify, that is no

chance for any cross examination.

Mr. CANNON: I presume that is technically correct, although I don't care to put an incompetent witness in jail, if she is, as a matter of fact, incompetent.

* * * *

Q. Where have you lived in the last two or three years?

A. I refuse to answer any further. * * I will answer all questions as soon as I have seen my attorney. I haven't talked to him. I was very ill. I didn't talk to him.

Mr. MAGUIRE: Her attorney has been notified of the time of the hearing and he has already told Mr. Pray and myself over the telephone that he had advised her to tell the truth about the matter, so there is no excuse for her attitude.

Mr. CANNON: If she is incompetent, there is no use for me to commit her.

Mr. MAGUIRE: She is not incompetent. I believe counsel's position is this; that she is incompetent to testify against this defendant because there may be a marriage relation claimed between them.

Mr. CANNON: I understand that is the rule.

Mr. MAGUIRE: I think if the court please that I will ask for a continuance of this case pending some decision one way or the other as to her being competent and it may be quite likely she will change her mind when she understands more fully.

Mr. CANNON: I think she will. I will continue the case and you can call it up at any time you see fit.

Mr. CANNON: I will do this. I will take this case under advisement, and this witness will be committed to the county jail pending a decision in the matter, and I don't know just when I will be able to decide it, and her bond will be fixed at $2500."

Mr. MaGuire was Deputy United States District Attorney.

Thereafter the witness, Esther Wood, gave her testimony at the preliminary hearing, as appears from Government Exhibit 3.

WHEREFORE defendant prays that the judgment and the proceedings of the said District Court, may be reversed.

RALPH E. MOODY,
ROSCOE C. NELSON,
THOMAS MANNIX,
Attys. for Dft.

[Endorsed]: Assignments of Error. Filed Sept. 29, 1913.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 30 day of September, 1913, there was duly filed in said Court, an Order Allowing Writ of Error, in words and figures as follows, to wit:

[Order Allowing Appeal.]

In the District Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA,
vs.
MAX G. COHEN,
Defendant.

This 30 day of September, 1913, comes the defendant, by his attorney, and files herein and presents to the court a petition praying for allowance of a writ of error and assignment of errors intended to be urged by him, and praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Apeals for the Ninth Circuit, and that such other and further proceedings may be had as are proper in the premises.

ON CONSIDERATION WHEREOF the court does allow the Writ of Eror, and orders that the same shall operate as a supersedeas of the sentence and judgment given in the said District court, and that a transcript of the record, proceedings and papers in this case duly authenticated shall be sent to the Federal Circuit Court of Appeals.

R. S. BEAN,
Judge.

And afterwards, to wit, on the 30 day of September, 1913, there was duly filed in said Court, an Undertaking on Writ of Error, in words and figures as follows, to wit:

[Undertaking on Writ of Error.]

In the District Court of the United States for the District of Oregon.

No. 5829.

UNITED STATES OF AMERICA,
vs.
MAX G. COHEN,
Defendant.

WHEREAS, on the 4th day of August, 1913, the above named defendant, Max G. Cohen, was convicted in the above entitled court and cause, of the crime of subornation of perjury alleged in the indictment to have been committed by the defendant's suborning one Esther Wood to commit the crime of perjury within said District of Oregon; and

WHEREAS, on the said 4th day of August, 1912, the said Max G. Cohen was by the said District Court for the District of Oregon, sentenced to serve a term of two years in the Federal penitentiary at McNeil's Island, and to pay a fine of One Hundred Dollars; and

WHEREAS, the said defendant has appealed from said judgment of conviction, to the Circuit Court of Appeals for the Ninth Circuit and has presented to the District Court of the United States for the District of Oregon, his petition for a writ of error and his assignments of error, and on account thereof, said District Court did on the 30th day of September, 1913, allow said writ of error and granted a stay of execution of said sentence pending the final decision of said cause upon such appeal; and

WHEREAS, as a condition precedent to the granting of said order allowing said writ of error and staying said execution, the said defendant did by its order direct that the said defendant give bond in the sum of Ten Thousand Dollars.

NOW THEREFORE, in consideration of the premsies and of such appeal, we, Max G. Cohen as principal, and Grace Cohen and M. Pollay as sureties,

do jointly and severally acknowledge ourselves to be indebted to the United States of America in the full sum of Ten Thousand Dollars lawful money of the United States, to be paid to the United States of America, and to be levied upon all of our goods, chattels, lands, tenements and all other property, upon, however, this condition:

That if the said Max G. Cohen shall personally appear in the District Court of the United States for the District of Oregon when he shall be called upon or lawfully required by order of court or law so to do, and thereupon answer all matters and things as may be charged against him on behalf of the United States relative to or pertaining to such conviction as herein recited and shall at all times hold himself amenable and subject to the orders, the process and the commitment of the said District Court of the United States for the District of Oregon, and of the said Circuit Court of Apeals, as shall hereafter from time to time be made by said courts or either thereof, and shall at all times abide the orders and the judgments of said courts in said matters, and in event that said judgment shall be affirmed by the said Circuit Court of Appeals, will at all times hold himself in execution of said sentence, then this undertaking shall be void, otherwise it is to be and always remain in full force and effect.

MAX G. COHEN (Seal)
GRACE COHEN (Seal)
M. POLLAY (Seal)

Signed, sealed and acknowledged this 30 day of September, 1913, before Frederick H. Drake, United States Commissioner for the District of Oregon.

(SEAL) FREDERICK H. DRAKE,
United States Commissioner for the
District of Oregon.

[Endorsed]: Undertaking on Appeal. Filed Sep. 30, 1913.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 9 day of October, 1913, there was duly filed in said Court, a Writ of Error, in words and figures as follows, to wit:

[Writ of Error.]

In the United States Circuit Court of Appeals for the Ninth District.

MAX G. COHEN,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

THE UNITED STATES OF AMERICA, ss.

The President of the United States of America.

To the Judge of the District Court of the United States for the District of Oregon: Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the District Court before the Honorable R. S. Bean,

one of you, between United States of America, Plaintiff and Defendant in Error, and Max G. Cohen, Defendant and plaintiff in Error, a manifest error hath happened to the great damage of the said Plaintiff in Error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid, being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

Witness the Honorable Edward Douglas White, Chief Justice of the Supreme Court of the United States this 9th day of October, 1913.

(Seal) A. M. CANNON,
Clerk of the District Court of the United States for the District of Oregon.

[Endorsed]: Writ of Error. Filed Oct. 9, 1913.
A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 9th day of October, 1913, there was duly filed in said Court, a Citation on Writ of Error, in words and figures as follows, to wit:

[Citation on Writ of Error.]

UNITED STATES OF AMERICA,
District of Oregon.—ss.

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Oregon, wherein Max G. Cohen is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this 9th day of October, in the year of our Lord, one thousand, nine hundred and thirteen.

R. S. BEAN,
Judge.

Service of the within Citation admitted at Portland, Oregon, this 9th day of Oct, 1913.

CLARENCE L. REAMES,
United States Attorney.

[Endorsed]: Citation on Writ of Error. Filed Oct. 9, 1913.

A. M. CANNON,
Clerk.

INDEX

In the United States Circuit Court of Appeals

NINTH CIRCUIT

FEBRUARY TERM, 1914

UNITED STATES OF AMERICA, Respondent vs. MAX G. COHEN, Defendant-Appellant	No. 2339.

APPELLANT'S BRIEF

STATEMENT OF THE CASE

Max G. Cohen, a practicing attorney of the City of Portland, Oregon, the defendant in the court below, was indicted for subornation of perjury and was found guilty by the jury at the trial on the 4th day of June, 1913, and thereafter sentenced to two years' imprisonment and to pay a fine of $100. The circumstances out of which the case arose are as follows:

One Jake Gronich was arrested prior to May 7, 1912, for violation of the White Slave Traffic Act, in that he was accused of transporting one Esther Wood, who was his wife, from Cleveland, Ohio, to Portland, Oregon, for immoral purposes.

Jake Gronich was arrested and his preliminary hearing was had before United States Commissioner Cannon on or about the 9th day of May, 1912.

His wife, Esther Wood, was arrested on or about the 7th day of May, 1912, and held as a witness, and at the hearing she was compelled, under various threats of imprisonment for contempt, to testify against the said Gronich, although both the United States Commissioner and the United States District Attorney were informed that she was the wife of the defendant Gronich.

As appears from Government Exhibit 3, attached to the Bill of Exceptions, Esther Wood at the hearing in answer to questions relative to her having practiced prostitution in various places, and also relating to certain postal cards claimed to have been sent by Jake Gronich, denied that she had practiced prostitution, and said that she did not remember about the postal cards.

The indictment against the defendant, Max G. Cohen, was based upon the claim that this testimony given by Esther Wood at the preliminary hearing before United States Commissioner Anderson M. Cannon was false and that the defendant, Max G. Cohen, procured, advised, instigated and caused Esther Wood to swear falsely at the said hearing.

At the trial of Max G. Cohen on the issue of subornation the Government's case hinged on the testimony of three self-confessed habitual prostitutes,

Esther Wood, Rose Heller and Violet Woods, who testified as to the conversation which took place in the Oxford Hotel in the City of Portland, where the defendant, Max G. Cohen, was called about five o'clock in the afternoon of May 7, 1912, and at which place and time the Government claims he advised Esther Wood to swear falsely regarding her prior prostitution and the receipt and sending of the postal cards.

No motive for the subornation was shown, and Max G. Cohen had no connection with the preliminary hearing save his visit to the Oxford Hotel by request on the 7th day of May, 1912, to confer with Esther Wood, whom he did not know, and his gratuitous appearance at the preliminary hearing at which he was informed by the United States deputy attorney that he was not in the case at all and that his presence was resented. (See Gov. Ex. 3, page 6.) *At the time of the conversation referred to between Max G. Cohen and Esther Wood, Esther Wood had not been arrested or subpoenaed as a witness for the preliminary hearing or on any other matter connected with the case.*

QUESTIONS INVOLVED.

The questions involved and the manner in which they are raised are shown in the following

ASSIGNMENTS OF ERROR.

I.

The court erred in overruling the demurrer to

the indictment, said demurrer being based upon the following grounds:

"a. That more than one crime is attempted to be charged in said indictment, said indictment consisting of but one count.

b. That the said indictment fails to state facts sufficient to constitute a crime.

c. That the facts stated in the indictment do not constitute a crime."

Our contention with relation to this assignment is that an United States commissioner is without jurisdiction to *try* any *issue* between the United States of America and a person charged with violation of the White Slave Traffic Act. Hence the demurrer to indictment in this case charging perjury in the trial of such an *issue* before an United States commissioner should have been sustained.

State v. Furlong, 26 Me. 69.

II.

The court erred in refusing the motion of the defendant for an order directing the jury to return a verdict of not guilty in the above entitled cause upon the following grounds and for the following reasons, to-wit:

"a. That no evidence had been introduced in the trial of said cause upon which a verdict of guilty could be based.

b. That the evidence which had been introduced in this cause was not sufficient to be the basis of a verdict of guilty.

c. That the evidence failed to show that any crime had been committed by this defendant.

d. That the evidence was not sufficient to show that the defendant had committed the crime set forth in the indictment in this cause."

The indictment charges that on or about the 7th day of May, 1912, the defendant, Max G. Cohen, "did unlawfully, knowingly, feloniously and corruptly procure, advise, obtain and suborn one Esther Wood to appear as a witness at the trial and hearing of said cause for the United States and to give in evidence before the said United States Commissioner certain matters material and relevant to the issue in the substance and to the effect following, to-wit: That she, the said Esther Wood, had never practiced prostitution in Baker, Oregon, and that she, the said Esther Wood, had never practiced prostitution in Portland, Oregon, or in Denver, Colorado, or in any other place in the United States, and that the said Esther Wood did not remember having ever received certain postal cards theretofore sent to her by the said defendant, Jake Gronich, and that she did not remember or recollect having written or mailed certain postal cards sent to and received by the defendant Jake Gronich."

In regard to the allegations that Esther Wood was suborned by the defendant to appear and perjure herself as alleged, Esther Wood had not been arrested at the time when the defendant is charged with the crime set forth in the indictment, and no evidence is introduced that she knew she would be arrested.

The points urged in connection with this assignment are:

The essential elements of subornation appear to be:

a. That the testimony of the witness claimed to have been suborned was false.

b. That it was given by him wilfully and corruptly knowing it to be false.

c. That the person claimed to be guilty of subornation knew or believed that such testimony would be false.

d. That he also knew or believed that the person claimed to have been suborned would wilfully and corruptly testify as advised.

e. That the person charged with subornation induced or procured the person claimed to have been suborned to give such false testimony.

f. That the testimony claimed to have been suborned was material.

Boren v. U. S., 144 Fed. 801.

State v. Fahey, 65 Atl. 690.

Commonwealth v. Smith, 11 Allen 243.

Commonwealth v. Douglas, 3 Metcalf 245.

The crime of subornation of perjury cannot be committed unless the person charged with subornation had in mind some particular tribunal or proceeding wherein he intended that the perjury should be committed. And if there are no proceedings instituted of which the accused has knowledge at the time when the crime of subornation of perjury is claimed to have been committed, and the language

claimed to constitute subornation of perjury is equivocal and may have to do with proceedings beyond the pale of the law of perjury, as well as proceedings wherein the crime of perjury may be committed, in such cases there are no facts upon which a charge of subornation of perjury can be predicated. Government detectives, marshals and inquisitors have no right to compel witnesses or persons accused of crime to give them information, and if the advice of an attorney relates or may reasonably relate to such interviews and inquisitions as to judicial proceedings, there is no subornation of perjury.

State v. Howard, 38 S. W. 908.
State v. Joaquin, 69 Me. 218.
Nicholson v. State, 26 S. E. 360.

In making out a *prima facie* case for the jury, civil or criminal, the trial judge must determine in the first instance, by assuming the truth of all the evidence introduced by the party seeking redress and admitting all reasonable inferences therefrom, whether the contentions of the party seeking redress are made out by the evidence introduced, to the degree of being probable, as distinguished from being merely possible. If the evidence makes the contentions of the party merely possible, he cannot have his case submitted to the jury, for in such case the jury would not be justified in guessing upon the truth of the issue. There must be, in order to make out a *prima facie* case, facts introduced rising above the degree of establishing a possibility, and making it probable that the contention of the party seek-

ing redress is true, before the judge is justified in declaring a *prima facie* case made out

People v. Bennett, 49 N. Y. 137.

Ex parte Meyer, 40 Pac. 953.

State v. Gordon, 76 Pac. 882.

Sparf v. U. S., 156 U. S. 57; 39 L. Ed. 343 at p. 360.

See also *Patty v. Salem Mills,* 53 Or. 357.

See also *Melton v. State,* 158 S. W. 550.

See also particularly the points and authorities under assignments following.

III.

The court erred in allowing to be introduced by the Government the complaint against Jacob Gronich filed in the preliminary hearing before Commissioner Anderson M. Cannon, said complaint being Government's Exhibit 1, reading as follows:

United States of America, District of Oregon, ss.

Complaint for violation of White Slave Traffic Act.

The United States

v.

Jake Gronich.

Before me, the undersigned, a United States Commissioner for the District of Oregon, personally appeared this day Charles P. Pray, who on oath deposes and says that the said Jake Gronich on or about the 8th day of April, 1912, at Cleveland, in the

State and District of Ohio, did unlawfully, knowingly and feloniously procure and obtain a ticket and tickets and form of transportation and evidence of right thereto to be used in interstate commerce by a woman, to-wit, Esther Wood, in going from the said Cleveland, in the State of Ohio, to Denver, in the State of Colorado, and from the said Denver, in the State of Colorado, to Portland, in the State and District of Oregon, and within the jurisdiction of this court, for the purpose of prostitution and debauchery and for an immoral purpose, to-wit: that she, the said Esther Wood, should live with him, the said Jake Gronich, as his concubine, whereby the said woman, to-wit, Esther Wood, was transported in interstate commerce from Cleveland, in the State of Ohio, to the City of Denver, in the State of Colorado, and from the said Denver, in the State of Colorado, to Portland, in the State and District of Oregon, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

And furthermore, the said deponent says he has reason to believe, and does believe, that Esther Wood and May Swindle, alias May Weller, are material witnesses to the subject matter of this complaint.

CHARLES P. PRAY.

Subscribed and sworn to before me this 7th day of May, 1912.

A. M. CANNON,
United States Commissioner.

The said complaint was immaterial to the issue involved in this cause; and is further immaterial on the ground that there is nothing therein contained showing the materiality of the testimony given at

the said preliminary hearing by the Government's complaining witness, Esther Wood, and it does not appear in what respect or in what manner the testimony of said witness was material to the issue involved in the preliminary hearing before Commissioner Cannon, nor was there any evidence introduced to show the materiality of the same, the issue to be determined at said hearing having been whether or not the Government had probable cause to hold Jake Gronich on the charge of the violation of the White Slave Traffic, and although the indictment charges that the defendant suborned Esther Wood to give false testimony at the *trial,* the record shows that the hearing before United States Commissioner Cannon to determine whether Jake Gronich should be held for violating the White Slave Traffic Act was *not* a trial.

IV.

The court erred in the admission of testimony offered by the Government in the following instance, to-wit: the testimony given by Esther Wood at the preliminary hearing before Commissioner Cannon to the effect that she did not practice prostitution in Baker, Oregon, in Portland, Oregon, Denver, Colorado, or anywhere else in the United States; and further testimony given at the trial of the above entitled cause, at which trial the said Esther Wood testified in substance, so far as relevant, as follows:

I have lived in Baker City, Oregon; Denver, Colorado; Cleveland, Ohio; Astoria, Oregon, and Portland, Oregon, and I have practiced prostitution in all these different places. At the preliminary hearing on the complaint against Jake Gronich before

Commissioner Cannon I was asked whether I had ever practiced prostitution at Baker, Denver or Portland, or any other place in the United States, and I answered no, whereas, as a matter of fact, I had practiced prostitution in the said places.

There was no evidence introduced at the trial to show that this testimony was material to the issue raised at the hearing before Commissioner Cannon on the said complaint against Jake Gronich for violation of the White Slave Traffic Act.

The points and authorities to which the attention of the court is specially asked in connection with these assignments are:

To establish perjury or subornation of perjury it is necessary not only to show that there was a false statement of fact made under oath, but the prosecution must go farther and show the materiality of the false statement to the issue as well; and this proof cannot be supplied either by opinions or by presumption.

McClelland v. People, 113 Pac. 640.

Bledsoe v. State, 42 S. W. 899.

Brown v. State, 36 S. W. 705.

Commonwealth v. Pollard, 12 Metcalf 225, 229.

Fletcher v. State, 123 Pac. 80.

Wilde v. State, 123 Pac. 85.

People v. Teal, 196 N. Y. 372; 89 N. E. 1086; 25 L. R. A. (N. S.) 120.

U. S. v. Howard, 132 Fed. 325.

Rich v. U. S., 33 Pac. 804.

Lawrence v. State, 2 Texas App. 479.

U. S. v. Shinn, 14 Fed. 447.

And it is not enough to introduce in evidence the record of the case in which it is alleged the false oath was taken. The Government must go further and introduce evidence showing the materiality of the alleged perjured testimony to the issue involved.

McClelland v. People, 113 Pac. 640.

Bledsoe v. State, 42 S. W. 899.

Rich v. U. S., 33 Pac. 804.

The fact of materiality cannot be established by the mere opinions of witnesses.

Washington v. State, 5 S. W. 119.

Foster v. State, 22 S. W. 21.

In testing materiality of testimony charged to be perjured, reference must be had to the issue as it existed when the oath was administered to the witness.

Bullock v. Koon, 4 Wend. 531.

V.

The court erred in allowing the introduction of certain postal cards by the Government, marked Government's Exhibits 4, 5 and 6, at the preliminary hearing before United States Commissioner Cannon, at which hearing Jake Gronich was charged with violation of the White Slave Traffic Act. Esther

Wood testified in substance that she did not remember having ever received certain postal cards theretofore sent to her by the said defendant Jake Gronich, and that she, the said Esther Wood, did not remember or recall having written or received certain post cards sent to and received from the said defendant Jake Gronich. Her testimony, so far as relevant, is in substance as follows:

At the preliminary hearing before United States Commissioner Cannon they exhibited to me the card, Gov. Ex. 4. This card was sent to me from Canton, Ohio, by Jake Gronich, and I got it at Denver, Colorado. I don't remember just when. Another card, Gov. Ex. 5, was exhibited to me at the preliminary hearing. Jake Gronich sent this card to me and I got it in Portland. At the preliminary examination before United States Commissioner Cannon they asked me if I had ever seen this card, and I remember saying once no and again that I didn't remember. At the time I so testified I did remember seeing the card before, and I knew that I was swearing falsely, but so testified because my lawyer advised me to. As to Gov. Ex. 6, at the preliminary hearing before United States Commissioner Cannon they asked me if Jake Green sent me this postal card, and asked me if I knew any fellow named Jake Green, and I said no, and they asked me if he sent it to me, and I said no, and again that I didn't remember. At the time I did remember. A card was exhibited to me which was in my own handwriting, and they asked me if it was my handwriting, and I said no, and they asked me again, and I said I didn't remember; and they asked me had I ever seen the card before, and I told them that I didn't remember. And at the time I so testified I knew I had seen it before and I did

remember, and I so testified because my attorney advised me to.

(The postal cards mentioned having been lost and misplaced, it has been stipulated that two of the postal cards were written by Gronich to the witness Esther Wood, and the third by the witness Esther Wood to the said Gronich; that each of the cards tended to show familiarity between the said parties, and that they showed upon their face that they had been transmitted through the United States mails and post marked approximately at the time Gronich is charged in the indictment to have transported the witness Esther Wood from Denver, Colorado, to Portland, Oregon.)

There was no evidence introduced at the trial of the above entitled cause between the United States Government and Max G. Cohen to show in what respect or in what manner the testimony in regard to the foregoing post cards was material to the issue involved in the preliminary hearing before Commissioner Cannon between the United States Government and Jake Gronich; nor was there any evidence introduced to show the materiality of the same in the above entitled trial.

The points and authorities in this connection are the same as those set forth under assignment of error No. IV, *supra*.

VI.

The court erred in admitting the testimony of Esther Wood to the effect that she swore falsely in reference to her prostitution in the preliminary hearing before United States Commissioner Cannon, wherein Jake Gronich was charged with violating

the White Slave Traffic Act, as well as to the effect that she swore falsely relative to the postal cards introduced in evidence and marked Gov. Exs. 4, 5 and 6, for the reason that she, the said Esther Wood, was the *wife* of Jake Gronich, and for that reason her testimony against Jake Gronich was prohibited. In so far as relevant, Esther Wood testified as follows, in substance:

I lived in Baker City, Oregon; Denver, Colorado; Cleveland, Ohio; Astoria, Oregon, and Portland, Oregon, and I have practiced prostitution in all these different places. At the preliminary hearing on the complaint against Jake Gronich before United States Commissioner Cannon I was asked whether I had ever practiced prostitution in Baker, or Denver, or Portland, or any other place in the United States, and I answered no, whereas, as a matter of fact, I had practiced prostitution in the said places, and I gave such testimony falsely because the defendant Max G. Cohen had advised me so to do.

In regard to the postal cards Esther Wood testified in substance:

At the preliminary hearing before United States Commissioner Cannon they exhibited to me a card, Gov. Ex. 4. This card was sent to me from Canton, Ohio, by Jake Gronich, and I got it at Denver, Colorado. I don't remember just when. Another card, Gov. Ex. 5, was exhibited to me at the preliminary hearing. Jake Gronich sent this card to me and I got it in Portland. At the preliminary examination before United States Commissioner Cannon they asked me if I ever seen this card, and I remember saying no and again that I didn't remember. At the time I so testified I did remember seeing the card

before and knew that I was swearing falsely, but I so testified because my lawyer advised me to. As to Gov. Ex. 6, they asked me at the preliminary hearing if Jake Green sent me this postal and asked me if I knew any fellow named Jake Green, and I said no, and they asked me if he sent it to me, and I said no, and again that I didn't remember. At the time I did remember. A card was exhibited to me which was in my own handwriting, and they asked me if it was my handwriting, and I said no, and they asked me had I ever seen the card before, and I told them I didn't remember, and at the time I so testified I knew that I had seen it before and did remember, and I so testified because my attorney advised me to.

It also appeared from the testimony that Esther Wood had been married to Jake Gronich at Cleveland, Ohio, December 10, 1910, and that at the date of the trial of the above entitled cause the said Jake Gronich and Esther Wood were still husband and wife and had never been divorced.

The points and authorities to which the attention of the court is called in connection with this assignment are:

In the case of *U. S. v. Reid et al.*, 12 How. 362, 13 L. Ed. 1023, the rule of practice in the federal courts for the trial of criminal cases is laid down by Chief Justice Taney as follows:

> "The rules of evidence in criminal cases are the rules which were in force in the respective states when the judiciary act of 1789 was passed. *Congress may certainly change it whenever they think proper* within the limits prescribed by the Constitution. But no law of a state made since

1789 can affect the mode of proceeding or the rules of evidence in criminal cases."

See leading cases on same subject, *Logan v. U. S.*, 144 U. S. 263, 36 L. Ed. 429.

While the foregoing rule of practice is still in force in the federal courts, Congress has "certainly" (to use the language of Chief Justice Taney) changed the practice in preliminary hearings of persons accused of crime against the United States by the enactment of Section 1014 of the Revised Statutes of U. S. That section provides that any offender against the laws of the United States may be arrested, imprisoned or bailed, as the case may be, "agreeably to the usual mode of process against offenders in such state." And this means that in all hearings for the arrest and commitment of offenders against the laws of the United States the then practice of the state court shall be followed.

In re Dana, 68 Fed. 886 at 889.

U. S. v. Sauer, 73 Fed. 671.

U. S. v. Garclon, 82 Fed. 611.

U. S. v. Rundlett, 2 Curt. U. S. 41.

U. S. v. Martin, 17 Fed. 156.

U. S. v. Greene, 108 Fed. 816.

Martin v. U. S., 44 Fed. 405.

U. S. v. Horton, 2 Dillon U. S. 94.

At the time Jake Gronich was arrested for violation of the White Slave Traffic Act, Chapter XCI of Lord's Oregon Laws was in full force and effect.

This chapter sets forth the procedure in preliminary hearings of persons charged with crime.

Section 1535 of Chapter XXI of Lord's Oregon Laws is as follows:

> "In all criminal actions where the husband is the party accused, the wife shall be a competent witness, and when the wife is the party accused, the husband shall be a competent witness; *but neither husband nor wife, in such cases, shall be compelled or allowed to testify in such case unless by consent of both of them;* provided, that in all cases of personal violence upon either by the other, the injured husband or wife shall be allowed to testify against the other."

This section prescribed the rule by which the United States commissioner was bound in the preliminary hearing of Jake Gronich, in which hearing the *wife* of Jake Gronich, Esther Wood, was *compelled* and *allowed* to be a witness. The civil section of Lord's Oregon Laws, to-wit, Section 733, does not apply in criminal proceedings.

State v. McGrath, 35 Or. 1095; 57 Pac. 321.

State v. Luper, 49 Or. 607; 91 Pac. 444.

State v. Luper, 95 Pac. 811.

Basset v. U. S., 137 U. S. 496; 34 L. Ed. 763.

Section 1535, L. O. L., excepts only cases of "*personal violence* upon either by the other" from the general prohibition of testimony by the husband and wife against each other in criminal proceedings, and personal violence under this statute means *direct*

forcible personal violence upon the *body* of the injured spouse as distinguished from injury to the marriage relation.

The words *"personal violence"* are to be construed according to the ordinary and commonly understood meaning of the words as used by English speaking people. "Violence" imports active force, and the adjective "personal" used to qualify its meaning imports that the violence shall be to the person as distinguished from his abstract or intangible rights.

Basset v. U. S., 137 U. S. 496; 34 L. Ed. 762.

State v. Burt, 17 S. D. 7; 94 N. W. 409; 106 Am. St. Rep. 759 and note.

People v. Curiole, 137 Cal. 538; 70 Pac. 468.

Miller v. State, 40 S. W. 313.

Brock v. State, 71 S. W. 20; 100 Am. St. Rep. 859.

People v. Quanstrom, 93 Mich. 259; 53 N. W. 167; 16 L. R. A. 725.

In re Mayfield, 141 U. S. 113; 35 L. Ed. 637.

Stein v. Bowman, 13 Pet. 209; 10 L. Ed. 129.

Commonwealth v. Sapp, 90 Ky. 580; 29 Am. St. Rep. 405.

The distinction is to be drawn between the statute of Oregon and the statutes of some of the states which do not restrict testimony to matters involving "personal violence," but allow generally testimony of husband and wife when an *offense* has been committed by one against the other. In construing such

statutes some courts have allowed evidence of wrongs by one spouse against the other which were in their nature wrongs against the marital relation rather than wrongs against the spouse by way of "personal violence."

State v. Chambers, 87 Ia. 1; 53 N. W. 1090.

Dill v. People, 19 Colo. 477; 41 Am. St. Rep. 260; 36 Pac. 232.

In a case such as this, where a husband brings his prostitute wife to this state for prostitution with her aid, assistance and consent, this cannot be said, at least if we look at things as they are, to be an act of personal violence, for the harlot in such case is only plying her trade: *Volenti non fit injuria.*

Goldnamer v. O'Brien, 33 S. W. 831.

People v. Cundle, 137 Cal. 538; 70 Pac. 470.

Miller v. State, 40 S. W. 313.

See particularly authorities cited on page 24.

VII.

The court erred in giving the following instruction:

"Now it appears, or there is evidence tending to show that Esther Wood was the wife of Gronich at the time of his arrest, and had been for some time prior thereto. That would not excuse him from a violation of the White Slave Traffic Act. No man has a right to transport his own wife from one state to another for the purpose of prostitution, so the fact

that she was his wife would be wholly immaterial upon that inquiry or upon this."

The points and authorities in this connection are the same as those under assignment of error No. VI, *supra*.

VIII.

The court erred in giving the following instruction:

"Now something has been said about the manner in which Miss Wood was treated before the commissioner. Now, I do not think that is very material in this case. If she was sworn and testified as a witness in that case and knowingly and wilfully testified falsely, she committed perjury, and that is about all that is necessary to be said about that matter. It is one of the facts in the case, and you have a right to weigh it along with all the other testimony in the case; but however badly she may have been treated or however wrongly she may have been treated would be no justification or excuse on behalf of this defendant if, as a matter of fact, she committed perjury at his request or his instigation."

The evidence shows that Esther Wood was married to Jake Gronich at Cleveland, Ohio, on the 10th day of December, 1910, and that she was the wife of Jake Gronich at the time of the preliminary hearing before United States Commissioner Cannon, at which hearing Jake Gronich was complained of for violation of the White Slave Traffic Act. At the said hearing the said Esther Wood was subjected to threats of imprisonment unless she testified at the said hearing against the said Jake Gronich, as appears from Gov. Ex. 3, attached to the bill of exceptions.

At the preliminary hearing appears from the record, Gov. Ex. 3, p. 2, in the testimony of Esther Wood:

Mr. Cannon: You understand you can be punished for your attitude?

A. Yes, sir.

Q. Do you prefer to be punished and kept in jail rather than testify?

A. Yes, sir.

Q. Very well then, Miss Wood, this is probably what will happen to you unless you do testify. You will probably have to go to jail for an indefinite time if you prefer to do that rather than answer simple questions.

* * * * * * *

Mr. Maguire: Q. What is your name?

A. I refuse to talk. I told you once.

Q. How old are you? Do you refuse to answer that? Where have you lived in the last two years? Do you refuse to answer that question also?

A. Yes, sir.

Q. On what ground?

Mr. Cannon: I don't think there is any use in pursuing this hearing any further. I think I will—

Mr. Stephenson: I would like permission, if your Honor please, to ask the witness one question.

Mr. Maguire: If the court please, I object to that. The Government, I think, has subpoenaed this witness, and as she has refused to testify, that is no chance for any cross examination.

Mr. Cannon: I presume that is technically correct, although I don't care to put an incompetent witness in jail if she is, as a matter of fact, incompetent.

* * * * * * *

Q. Where have you lived in the last two or three years?

A. I refuse to answer any further. * * * I will answer all questions as soon as I have seen my attorney. I haven't talked to him. I was very ill. I didn't talk to him.

Mr. Maguire: Her attorney has been notified of the time of the hearing and he has already told Mr. Pray and myself over the telephone that he had advised her to tell the truth about the matter, so there is no excuse for her attitude.

Mr. Cannon: If she is incompetent there is no use to commit her.

Mr. Maguire: She is not incompetent. I believe counsel's position is this: that she is incompetent to testify against this defendant because there may be a marriage relation claimed between them.

Mr. Cannon: I understand that is the rule.

Mr. Maguire: I think, if the court please, I will ask for a continuance of this case pending some decision one way or the other as to her being competent, and it may be quite likely she will change her mind when she understands more fully.

Mr. Cannon: I think she will. I will continue the case and you can call it up at any time you see fit.

Mr. Cannon: I will do this. I will take this case under advisement, and this witness will be com-

mitted to the county jail pending a decision in the matter, and I don't know just when I will be able to decide it, and her bond will be fixed at $2,500.

Mr. Maguire was deputy United States district attorney.

Thereafter the witness Esther Wood gave her testimony at the preliminary hearing, as appears from Government Exhibit 3.

The points and authorities to which the attention of the court is specially asked in this connection are as follows:

The United States commissioner under Section 1535, L. O. L., exceeded his power in compelling or allowing Esther Wood to give evidence under oath against her husband, Jake Gronich, in the preliminary hearing wherein he was charged with a violation of the White Slave Traffic Act, and for that reason a charge of perjury or subornation of perjury cannot be predicated upon such evidence, even though false, for the statute is prohibitive of such evidence except by joint waiver of husband and wife, and there was no waiver here.

U. S. v. Grottkan, 30 Fed. 672.

U. S. v. Bell, 81 Fed. 830.

State v. Trask, 42 Vt. 152.

State v. Furlong, 26 Me. 69.

Collins v. State, 78 Ala. 433.

People v. Fitmus, 102 Mich. 318.

U. S. v. Bedgood, 49 Fed. 54.

U. S. v. Law, 50 Fed. 915.

U. S. v. Howard, 37 Fed. 666.

And when a witness has the right of refusing to testify under the fifth amendment to the Constitution of the United States, which prohibits forced self incrimination, and is nevertheless compelled to testify, such testimony, even though false, cannot be made the basis of a charge of perjury or of subornation of perjury.

U. S. v. Bell, 81 Fed. 830.

See *Brown v. Walker,* 161 U. S. 591.

Pipes v. State, 9 S. W. 614.

See Wigmore on Evidence, Sec. 2251.

ARGUMENT.

The Indictment on Demurrer.

A demurrer was filed challenging the sufficiency of the indictment and pointing out that no crime was sufficiently charged. The indictment states:

"That on, to-wit, the 9th day of May, 1912, there came on to be *tried* before the Hon. Anderson M. Cannon, United States commissioner for the District of Oregon, a *certain issue* in due manner *joined* between the United States of America and Jake Gronich, based upon a certain charge and complaint then and there pending before the said United States commissioner against him, the said Jake Gronich, for a violation of the White Slave Traffic Act."

And then the indictment sets forth the particular allegations contained in the complaint which charged Jake Gronich with violating the White Slave Traffic Act. Then we find in the indictment the charge "that

before the *trial* of said issue" the defendant suborned Esther Wood. Later in the indictment we find, as appears from page 3 of the record, "that afterwards on, to-wit, the 9th day of May, 1912, the said issue was *tried* and heard before the said United States Commissioner Cannon, etc.," and still further on appears the allegation that the evidence was adduced under the oath of Esther Wood that her testimony "at said *trial* and hearing would be the truth, the whole truth and nothing but the truth, and it did then and there upon said issue, *trial* and hearing become and was a material inquiry whether she had 'practiced prostitution' at different places." And further on in the said indictment we find that "upon the *trial* and hearing of said issue of said cause (she) did wilfully, corruptly and knowingly," etc., swear falsely.

The foregoing statement shows that the indictment charges the subornation of perjury to have been with reference to a *trial* and *issue* therein joined between the United States on one side and Jake Gronich on the other, with United States Commissioner Cannon determining, as a trier of the fact, whether or not Jake Gronich was guilty of the crime charged. Now it is obvious that if such be the fact the United States commissioner was outside of his jurisdiction, for his authority was limited to holding Jake Gronich for the grand jury, and he could not as commissioner try Gronich. No preliminary hearing of Jake Gronich is even mentioned in the indictment.

The defendant herein had the right to have the crime of which he was accused set forth clearly and accurately, and if the facts are as charged in the indictment and these alone are admitted by the demurrer then no crime of subornation of perjury was

committed, for the reason that the action of the United States commissioner in joining and trying the issue respecting the guilt or innocence of Jake Gronich for violation of the White Slave Traffic Act was clearly extra-judicial.

U. S. v. Cruikshank, 92 U. S. 542; 23 Lawyers Ed. 588.

A preliminary hearing for determining whether an offender against the law should be held to answer for the offense is not a trial. A trial imports the determination of an issue. No issue is determined in a preliminary hearing. The degree of proof required and the nature of the proceedings involved in a preliminary hearing are entirely different from those characterizing a trial.

State v. Belding, 48 Or. 95.

See also *In re Dana,* 68 Fed. 886.

The meaning of the word "issue" has been settled for ages. Sir Matthew Hale says: "When in the course of pleadings they come to a point which is affirmed on one side and denied on the other, they are said to be in issue."

See *White v. Emblem,* 28 S. E. 761, 43 W. Va. 819, and Gould on Pleading (5th ed.) defines an issue as follows:

"An issue in pleading is defined to be a single certain and material point issuing out of the allegations of the parties and consisting regu-

larly of an affirmative and negative," citing Coke on Littleton.

See also Greenleaf on Evidence, Sec. 51.

And in *U. S. v. Greene,* 100 Fed. 941, 944, the court held that there was no "issue" as respects the indictment until the defendant was arraigned and made his plead. Brown, J., in the foregoing case said (p. 944):

> "The objection that this (hearing before commissioner) would be 'trying the issue' is premature. There is no 'issue' as respects the indictment until the defendants are committed, removed and arraigned and plead not guilty."

See cases cited in Vol. IV, Words and Phrases, p. 3793.

So with respect to the meaning of the word "trial" there is no uncertainty. There have been trials at common law dating back to the Norman conquest, trials by ordeal and by battle and by compurgation of witness, and finally trial by jury or by the court. But the term "trial of an issue" has never been applied to a preliminary hearing of one charged with crime. The only purpose and the sole scope of such a proceeding is the ascertainment by the magistrate whether or not there appears to be sufficient basis to justify the magistrate in holding the alleged offender for further investigation by the grand jury or other tribunal. Blackstone defines a "trial" to be "the examination of the matter of fact in issue

in a cause." 3 Blackstone Com. 330. Lord's Oregon Laws defines a trial in Section 113 as follows: "A trial is the judicial examination of the issues between the parties whether they be issues of law or fact."

In *Van Buren v. State*, 91 N. W. 201, Judge Holcomb said: "*A preliminary hearing, however, is in no sense a trial* in which the defendant's rights, in respect to their guilt or innocence, is adjudged, determined or prejudiced, whether a hearing results in the discharge of the accused person or in holding him to appear in the district court to answer the accusation made against him."

Latimer v. State, 53 Neb. 609; 70 Am. St. Rep. 403.

See generally Words & Phrases, Vol. VIII, p. 7099.

The case of *State v. Furlong,* 26 Me. 69, is in point here. Furlong was indicted for perjury alleged to have been committed in giving testimony before a justice of the peace, he being charged with having engaged in a riot. The record showed that there was no trial before the justice but only a preliminary examination. A demurrer to the indictment was interposed for the reason that it appeared on the face thereof that the accused was *"tried"* before the justice of the peace, who was without jurisdiction to *try* such cases, his power being limited to holding the accused. Shipley, J., said:

"It will be perceived that the indictment alleges that Robinson 'was put on trial,' that the

justice 'proceeded to hear and determine the matter of said complaint, that the accused testified falsely to cause the said John G. Robinson to be convicted of the offense charged.' This language is suited to describe proceedings before a magistrate, who has assumed jurisdiction to try and decide finally upon the guilt or innocence of the accused, and not appropriate to describe proceedings when the magistrate assumes only to examine into the guilt or innocence of the accused for the purpose of deciding whether he should be committed or bound over to appear before some other tribunal for trial. The indictment must therefore be considered as describing a case over which the magistrate had assumed jurisdiction for the purpose of a trial for the conviction or acquittal of Robinson. * * * As the justice in this case had no such jurisdiction as he appears by the indictment to have assumed, he could have no legal authority to administer the oath, and the accused could not on that occasion have committed perjury."

So that if the United States commissioner did what the indictment says that he did, namely, *try* Jake Gronich for violating the white slave traffic act, the proceedings at that trial, so called, were *coram non judice*, for the trial of such offenses as violation of the white slave traffic act come within the jurisdiction of the federal courts and not within the jurisdiction of the commissioners thereof, and it follows for these reasons that the indictment failed to state a cause of action. *If, on the other hand the proceeding before the United States commissioner was not a "trial" but was a preliminary hearing within the province* of the commissioner, then there is a clear variance between *the indictment and the proof, and Max G. Cohen was indicted for one offense and convicted for another.*

DID THE GOVERNMENT MAKE OUT A PRIMA FACIE CASE?

The next question which, following the order of the assignments of error, we shall discuss is whether or not the Government failed to make out a *prima facie* case.

The defendant Max G. Cohen was charged in the indictment with unlawfully, feloniously and corruptly procuring, advising, obtaining and suborning one Esther Wood to appear as a witness at the trial and hearing of a case before the United States commissioner (the preliminary hearing in the case of the United States v. Jake Gronich for violation of the white slave traffic act), and to give in evidence before the said United States commissioner certain matters material and relevant to the issue in substance and to the effect following, to-wit: That she, the said Esther Wood, had never practiced prostitution in Baker, Oregon, and that she, the said Esther Wood, had never practiced prostitution in Portland, Oregon; and that she, the said Esther Wood, had never practiced prostitution in Denver, Colorado; and that she, the said Esther Wood, had never practiced prostitution at any place in the United States; and that she, the said Esther Wood, did not remember having ever received certain postal cards theretofore sent to her by the said defendant Jake Gronich; and that she, the said Esther Wood, did not remember or recall having written or mailed certain postal cards sent to and received by the defendant Jake Gronich.

The Government, to make out its case against the defendant, called three women as witnesses, named Esther Wood, Violet Woods and Rose Heller. These

women admitted that they were habitual prostitutes and that they were engaged in that business at the time of the trial. So far as material to show that the Government failed to make out a *prima facie* case, the evidence of these three women, set out *in extenso* under the second assignment of error in this brief, summarized is as follows:

Esther Wood testified:

I live at the Levens Hotel in Portland. My occupation is that of a sporting girl, and has been for the last three years, including May 9, 1912. I have also practiced prostitution in Denver and in other places. On May 6th I lived with my husband, Jake Gronich, at the Levens Hotel, having come to Portland about a week before with my husband, and I had lived with him for three years prior to the 6th of May. He was arrested on the 6th of May. At the time I was out with a girl named Rose Heller, and when I came back to the Levens Hotel Mrs. Levens told me that my husband had been arrested *and that the detectives were waiting for me.* So I spent the night at Rose Heller's room at the Oxford Hotel instead of at the Levens Hotel, and I stayed there on the night of May 7th and was arrested on the night of the 8th of May. Mr. Cohen came up to my room at the Oxford Hotel about a quarter after five. When he came in I was in the room with Sadie Parker, Rose Heller and Violet Woods. I was lying on the bed crying. Mr. Cohen asked me if I was married to Jake Gronich. I told him that I was. I told him that I had sported in Portland one day, and he said, "Well, they can't find that out." Sadie Parker then told Mr. Cohen that I had worked for her a little over two weeks, and Mr. Cohen told Sadie that she

would not have to tell that. Then he said, "*They* have to prove that she is a sporting girl." Mr. Cohen then asked me whether I had any telegrams or letters in my trunk. I told him that I had postal cards, and he told me, "Well, if they should show you those just say you don't remember." Mr. Cohen asked me if I came direct from Cleveland here, and I told him that May and I had stopped in Denver and had a sporting house together, and Sadie Parker said that if they scared May she would tell the truth and get me up for perjury, and Mr. Cohen said, "She can deny that she ever sported," and then he said that when "*they*" took me down I should see May, because if May told that she and I had sported together I could say that I did sport but that I wasn't brought here for immoral purposes, and when I sported I did it of my own free will; and if May didn't tell, I could deny that I sported. Then Mr. Cohen advised me not to go away, and said, "Now I will give you my card, and in case *they* do take you call me up no matter what time it is; you call me up when *they* come down to take you." And he wrote down his phone number and gave me his card. I told him I had some postal cards in my trunk from different places where I sported, and he said, "When *they* show you the postal cards then just say that you don't remember." He went away just before six. I was arrested late that same night, about half past ten. I had not been arrested at that time I talked to Mr. Cohen. I retained Mr. Cohen last afternoon as my lawyer, and I paid him nothing for his services. Sadie Parker told him we were down and out; we didn't have any money.

Rose Heller testified that she was in the room at the time when the defendant Max G. Cohen is

claimed by the Government to have suborned Esther Wood, namely, between five and six o'clock on the afternoon on the 7th of May, 1912. So far as material to the contention that the Government failed to make out a *prima facie* case she testified in substance as follows:

I got him (Mr. Cohen) about the night after Jake was arrested (May 6, 1912) for Esther Wood. Mrs. Levens telephoned me and told me to go and get Mr. Cohen. I went to Mr. Cohen's office and left my name with the stenographer. He came down that afternoon to the Oxford, Room 3. When he came into the room there was Sadie Parker, Violet Woods, Esther Wood and myself there. It must have been between four and five o'clock in the afternoon. He stayed about ten or fifteen minutes.

Q. Was anything said by Mr. Cohen as to what Esther Wood should say about her having practiced prostitution?

A. Well, he told her to say that she didn't sport.

Q. Was anything said about May Swindle?

A. No, I didn't hear anything about it.

Practically all the testimony of Violet Woods, the third woman called by the Government as a witness against Max G. Cohen, is copied herein from the bill of exceptions, as her statement of what happened in the room on the night in question appears more accurate and better connected than the testimony of either Esther Wood or Rose Heller.

Violet Woods testified in substance, so far as material, as follows:

I live at the Levens Hotel and my occupation is a sporting girl. I am acquainted with the defendant

Max G. Cohen. I have seen him once, that was the day after Gronich's arrest, either May 6 or 7, 1912. I was in Rose Heller's room before he came in. Rose Heller, Esther Wood and Sadie Parker were there also. It was some time after five o'clock before he arrived. I think he stayed about half an hour. I don't know whether Sadie Parker or Rose Heller called for him. Esther Wood was on the bed crying, and Mr. Cohen said, "What does this mean and what is this about?" Sadie Parker says, "She is the girl of the two fellows that were taken last night." Mr. Cohen said, "Yes, I just came; I was up there and saw them turned over to the marshal," and he said, "They have a colored lawyer." Sadie Parker asked if he could do anything. He asked Esther if she was married and Esther hesitated and she didn't want to say anything, and Sadie Parker said, "Esther, you can tell Max because he is your lawyer and he can see what he can do for you," and Esther didn't want to tell him anything at first, and finally we told her, all of us, "Go ahead, tell Max Cohen; may be he can do something for you." Esther started to tell about her case, and she said, "We came up here with this May and this Joe," and he said, "Yes, I know, I have heard May was married to him," and Esther spoke up and said, "Is this so?" She was kind of surprised, and he said, "Yes, I think she said she was married," and so Sadie Parker handed Esther $3, and she said I would give her $5 and we would see if we could not get her away from here. Mr. Cohen said that would not do; "it is no use for her to go away," as we asked him if that would not be best. He said, "No, I wouldn't advise her to go away; if she goes away she might just as well give herself up to the Government." He said, "She has no chance to get away."

And Esther had told him the different places where she had been, and she told him where she had sported one day here. She said about these different places, "What will they do if *they* find out?" and Mr. Cohen said, "Well, have you sported since you have been back?" She said, "Yes, I have sported one day on Third street since I have been back." Sadie Parker then said, "She worked for me last year about Christmas day, something like that," and he said, "*They* won't find that out; you can say you were rooming there," and Sadie Parker said, "She has been at Astoria," and Esther Wood spoke up and told Mr. Cohen that when she was on her way out here she had a house with May in Denver, and she said she was here last year in Baker City, and sported in Astoria and Portland since she came back, and he said, "*They* will have to prove you have been sporting; I don't think *they* can find out." And Esther Wood said, "What will I do if *they* do find out?" He said, "Well, if *they* do find out that May has told you have (been sporting) just find out she has told. *They* might scare you and tell you, but find out for yourself. Then you can say you did it of your own accord, but your husband didn't know anything about it, and if she tells you have been sporting, say that Jake didn't know anything about it," that she had done it of her own free will; and if May didn't tell, Mr. Cohen told her to deny that she had ever been sporting.

That Mr. Cohen asked her if she had any letter or telegrams in her trunk, and she said she didn't know whether she had any letters or telegrams or not, but thought she had some postals that Jake sent her, and that they were in Jake's handwriting, and Mr. Cohen said, "Well, if *they* show you those

postals you can say you don't remember anything about them; you don't remember them."

On cross examination Violet Woods testified, so far as material, as follows:

There were five of us in the room, including Mr. Cohen, and all the conversation was held openly in the presence of everybody. Mr. Cohen asked Esther first how long she had been back, and she said just a few days, and he asked her had she been sporting since she came back, and Esther didn't want to say anything. After that Esther started to tell him that she came out here with May and Joe Albin. I told Mr. Cohen I was down in Astoria and Esther was sporting there, and Mr. Cohen said, "Well, they can't find that out; they will have to prove it." And Esther asked what she should do if May told that they had had a house in Denver, and Mr. Cohen said that she should find out first that May had told, and if May had told, that she could say that she did it without her husband's knowing it and of her own free will; and that if May didn't tell, she could deny she had been sporting. He told her twice she could deny it. At that time Esther Wood had not been arrested and nobody had seen her.

The defendant pleaded not guilty and denied the commission of the crime charged or any intent to commit such crime.

The first fact to be pointed out in connection with this testimony is that at the time this conversation took place in the Oxford Hotel between the defendant Max G. Cohen and Esther Wood, with the other women present, Esther Wood *had not been arrested*, and she had no knowledge that she would

be arrested, except that from her own testimony it appears that Mrs. Levens told her that the detectives had been after her. There is nothing in the evidence to show that the defendant Max G. Cohen knew when the preliminary hearing of Jake Gronich would be held, whether immediately or at some remote time in the future, or that at the time of said conversation he knew that Esther Wood would be compelled to testify against her husband, Gronich. There is no evidence at all in the testimony of Esther Wood, Violet Woods or Rose Heller that Max G. Cohen either directly or indirectly advised Esther Wood to *give any testimony,* false or otherwise, in *any judicial proceedings;* and outside of judicial proceedings Esther Wood was under no obligation to tell the detectives anything. She had the right to keep her mouth shut. She also had the right to tell the detectives anything she pleased, false or true, regarding her relations with Jake Gronich as long as she was not under oath. If Max G. Cohen did indeed advise Esther Wood as she said he advised her, the natural, if not inevitable, conclusion from the testimony of the Government's witnesses as to the conversation at the Oxford Hotel that he meant and intended that she should not incriminate herself when talking to the detectives, who were after her, as appears from her own testimony; for the only persons who had sought to interrogate Esther Wood up to this time were the detectives who had called at the Levens Hotel.

In order to constitute the crime of subornation of perjury the person charged with the subornation *must have had in mind some particular tribunal or proceeding wherein he intended that the perjury should be committed;* and if there are no proceed-

ings instituted of which the accused has knowledge at the time the crime of subornation of perjury is claimed to have been committed, and the language claimed to constitute subornation of perjury is equivocal and may have to do with proceedings beyond the pale of the law of perjury, as well as proceedings wherein the crime of perjury may be committed, in such case there are no facts upon which a charge of the subornation of perjury can be predicated. Government inquisitors have no right to compel witnesses or persons accused of crime to give them information, and if the advice of an attorney relates or may as reasonably relate to such interviews and inquisitions as to judicial proceedings, there is no subornation of perjury.

In the trial of the defendant herein there was direct evidence given by Esther Wood and her associates of the talk had with her in the Oxford Hotel on the afternoon of May 7, 1912; but there is no direct evidence of any conversations taking place in that room on that occasion to the effect that Esther Wood should give *any evidence at a judicial hearing;* and there is no circumstance in evidence showing that the defendant intended in his conversation with Esther Wood at the Oxford Hotel that she should give any *testimony* anywhere. According to all the testimony given by Esther Wood and her associates, all he did, at the Oxford Hotel, on the afternoon of May 7, 1912, was to advise Esther Wood what to say. But *when,* or to *whom,* or *wherein* she was to say what she claims she was told to say,—as to all this, the evidence is silent except as to Esther Wood's own deductions and opinion—if the quoted answers may be so termed — that the conversation she had with the defendant on the aforesaid occasion

at the Oxford Hotel constituted advice to commit perjury herself before the United States Commissioner at the preliminary hearing of Jake Gronich.

See, also, in connection with the question of corroboration in a case of subornation of perjury, *Boren v. U. S.*, 144 Fed. 80, and *People v. Evans*, 40 N. Y. 1.

See more particularly State v. Howard 38. S. W. 908. State v. Joaquin 64 Pac 218. Nicholson v State 75 SE 360.

MATERIALITY OF THE TESTIMONY.

A fatal error was committed by the trial court in allowing the defendant to be convicted of subornation of perjury, in that the testimony claimed to have been falsely given at the hearing before U. S. Commissioner Cannon was not shown to have been *material* to the issue involved at that hearing. To prove the crime of perjury, or subornation of perjury, it is necessary not only to show that there was a false statement of fact made under oath, but the prosecution must go farther and show the materiality of the false statement to the issue as well, and this proof cannot be supplied, either by opinion evidence or by presumption.

McClelland v. People, 113 Pac. 640.

Bledsoe v. State, 42 S. W. 899.

Brown v. State, 36 S. W. 705.

Commonwealth v. Pollard, 12 Metc. 225-229.

Fletcher v. State, 123 Pac. 80.

Wilde v. State, 123 Pac. 85.

People v. Teale, 196 N. Y. 372; 89 N. E. 1086; 25 L. R. A. (U. S.), 120.

U. S. v. Howard, 132 Fed. 325.

Rich v. U. S., 33 Pac. 804.

Lawrence v. State, 2 Texas App. 479.
U. S. v. Shinn, 14 Fed. 447.

Government's Exhibit 3, which is attached to the Bill of Exceptions, sets forth the proceedings before U. S. Commissioner Cannon at the preliminary hearing of Jake Gronich for violation of the White Slave Traffic Act. Esther Wood was called as a witness, and after considerable show of reluctance upon her part, testified that she was the wife of Jake Gronich, and denied that she had practiced prostitution in Baker, Oregon, Denver, Colorado, or in any other place in the United States. At that hearing she testified that she did not remember having received or sent certain postal cards to Jake Gronich. This evidence was entirely immaterial, for there was no evidence introduced at the preliminary hearing of Jake Gronich before U. S. Commissioner Cannon for violation of the White Slave Traffic Act, of the *corpus delicti.* The question properly before U. S. Commissioner Cannon at the aforesaid hearing (despite the allegations of the indictment) was to determine whether or not there was probable cause to hold Jake Gronich for violation of the White Slave Traffic Act in bringing Esther Wood to this state for the purpose of prostitution. It was not enough for the Government, in order to make out a case of probable cause, to show that Jake Gronich brought Esther Wood to this state; neither was it enough to show that Esther Wood was or was not a prostitute in other states and giving full effect to everything in Government's Exhibit 3, this was all that was adduced. Assuming that it was true that Jake Gronich brought Esther Wood to Portland, Oregon, and bought her ticket,

and assuming that it was true that she practiced prostitution in other states, and assuming that it was true that certain postal cards were exchanged between them (none of which refers to prostitution or evidence any intention to violate the White Slave Traffic Act, the Governemnt would have to go still farther and supply the missing link, and prove the *corpus delicti* by introducing some evidence that this woman was brought to the State of Oregon by Jake Gronich for the *purpose of prostitution*. There was a hiatus in the Government's case at the preliminary hearing because of the omission of any evidence tending to prove the importation of Esther Wood by Jake Gronich for the purpose of prostitution. All that the record shows is the complaint against Jake Gronich for violation of the White Slave Traffic Act, and the testimony of Esther Wood; and there was no evidence introduced of the purpose for which Jake Gronich brought Esther Wood to this state. It is not enough that the evidence of Esther Wood, as contained in Exhibit 3, relative to her prostitution in other states and to the postal cards, might have been relevant under some circumstances, or might have been material if other evidence showing the purpose of Jake Gronich in bringing Esther Wood to this state had not been introduced. The Government was under the necessity of showing the facts constituting the materiality of the alleged false oath of Esther Wood at the preliminary hearing before U. S. Commissioner Cannon. Before probable cause of a crime can be established, some evidence of that crime must be produced. Merely leading up to a possible crime is not evidence of the commission of that crime unless other evidence is introduced to show that such a crime has actually been committed. There is a dif-

ference between the degrees of evidence and no evidence at all.

Jake Gronich might have brought Esther Wood to Portland for any purpose, good or bad, even though she were a prostitute, and some evidence of this purpose had to be introduced beyond the mere fact of her former prostitution.

The White Slave Traffic Act penalizes interstate importation of females for immoral purposes. A man may, if he desires, marry a prostitute or a lewd woman, and import her into any state in the Union. The importation does not constitute the crime; it is the importation coupled with the intention to use the woman for the purposes of prostitution, or in violation of the accepted moral code, which constitutes the crime, and brings the transaction within the purview of the White Slavery Act.

The evidence in this case is undisputed that Esther Wood was the wife of Jake Gronich, and there being no evidence to the contrary at the hearing before Commissioner Cannon, the presumption of innocence requires the inference that Jake Gronich brought his wife to Portland for a proper purpose. He had a right to bring his wife here, and it was for the Government to introduce evidence at the preliminary hearing to show the criminal intent if any existed.

Mere prior prostitution alone could not establish that intent in view of the marriage between Jake Gronich and Esther Wood. It is possible that a woman engaged in prostitution might reform her ways and live with a man in lawful wedlock, and no presumption could bring the mere carrying of such a woman from one state to another within the pro-

visions of the White Slave Act. The presumption under these circumstances, in the absence of any evidence to the contrary, would be that Jake Gronich brought Esther Wood to Portland for a proper purpose.

See *State v. Belding*, 43 Or. 98, as to the degree of proof necessary to hold a man accused of crime in a preliminary hearing.

A case squarely in point with the present one on this phase is *McClelland v. People*, 113 Pac. 640. It appeared in that case that a girl named Nellie Hart was charged in the County Court with being a delinquent child under the statute, and that the defendant, McClelland, suggested that the girl be sent out of the jurisdiction of the court in order to avoid the publicity of a trial. And it further appears that with the aid of the defendant this plan was carried out, and he was thereafter formally charged in the County Court with contributing to the delinquency of the girl. At the trial in the County Court one Crowder was called as a witness, and testified that McClelland had nothing to do with the departure of the girl who had been charged with delinquency, but that he, Crowder, had assisted in her departure. McClelland was indicted for subornation of perjury because it was alleged that he induced Crowder to make this false statement at the hearing before the County Court. No evidence had been introduced in the County Court showing that the defendant, McClelland, had contributed to the delinquency of the girl in question, and his attorneys claimed in the trial for subornation of perjury that the procuring of Crowder to swear falsely that he assisted the girl in going away was not relevant to the issue at the trial in the County Court. The Supreme Court of

the State of Colorado agreed with this contention of the defendant's attorneys and reversed the case, the court saying, through White, J.:

> "It is equally essential upon the trial to prove the facts showing the materiality of the false statements or testimony. *The proof* should show how and wherein the matter upon which the perjury is assigned was material to the issue or point in question. * * * The evidence constituting the alleged perjury must have been material to the matter *then* being investigated, or the point in question before the court, and it devolves upon the people, upon trial, to show its materiality. While the test of materiality does not require the false testimony to be directly pertinent to the main issue or point in question, it does require that it have a legitimate tendency to prove or disprove some material fact in the chain of evidence; that is, that it be directly or circumstantially material. It is equally true that its materiality must be established by evidence either direct or circumstantial, and cannot be left to presumption. * * * The falsity of Crowder's testimony and his knowledge thereof may be conceded, yet there is an entire absence of evidence showing or tending to show the materiality of the alleged false matter testified to by him upon the issue or point in question in the case in the County Court wherein such testimony was given."

See, also, *Fletcher v. State,* 123 Pac. 80.
Wilde v. State, 123 Pac. 85.

The same rule was recognized in *Ruch v. U. S.,* 33 Pac. 804. The court in that case said in regard to a state of facts similar to those in this case:

"On the trial of the appellant in the court below, the testimony of the appellant given before the Registrar and Receiver of the local land office, on the trial of the land contest, was offered in evidence to the court and jury, in which it appeared that the appellant swore that on the 21st day of April, 1899, in the afternoon of that day, he saw Walter Sheppard at Borrow's Crossing of the South Canadian River, and saw him ride into and across said river and thence into the Oklahoma country; and it is this evidence that is alleged in the indictment to have been material on the trial of the land contest and on which the perjury is assigned; and it may be conceded that this testimony was false, but we fail to find in the record which purports to give all the testimony of the trial below, any proof that it was in any manner directly or indirectly, proximately or remotely material to the issue tried and determined by the Registrar and Receiver of the local land office in the land contest. * * * As there is no sufficient proof on the trial below of the materiality of the alleged false testimony of appellant, the verdict of the jury was not supported by the evidence and was contrary to law, and the court erred in overruling appellant's motion for a new trial."

In the case of *Bledsoe v. State*, 42 S. W. 899, it appears that one St. John was tried for the crime of burglary committed by breaking into a drug store. Bledsoe, the defendant, swore that he examined a safe in the drug store which the said St. John was charged with having broken into and that the door of the safe had been bored and picked, and that the hole was one-half inch in diameter. Bledsoe was indicted for perjury, the indictment charging that these statements in regard to the hole being bored in the safe door were false. He was convicted of per-

jury in the lower court, but the Supreme Court reversed the decision on the ground that it had not been shown that this evidence was material to any issue involved in the trial of St. John for the alleged burglary. The court said:

> "The only evidence tending to show that this evidence was material to the issue raised on the trial of St. John for having broken and entered the storehouse of the said company, is that it was proved by the witnesses of the state in that trial that at the time of his arrest St. John had in his possession certain drills and bits three-eighths inch in diameter. The theory of the state was that the hole in the safe was made with these drills or bits, and the testimony of Blersoe tended to refute and contradict this theory, for he testified that the hole was larger than the drills or bits. But it is not shown that the safe was in the storehouse or that it was bored into and broken into on the night of the burglary or about that time. * * * The fact that St. John was charged with having broken into safe and had drills that fitted or did not fit the hole in the safe, had no bearing upon his guilt or innocence of the charge of breaking and entering a storehouse, for which he was being tried, unless there be evidence connecting the boring of the safe with the entering of the storehouse. Until that be shown, the evidence concerning the safe is not shown to be material, but you cannot convict a man for one crime by showing that he is guilty of another and different crime."

See *People v. Teal,* 196 N. Y. 372; 89 N. E. 1085.

See, also, the same case reported in 25 L. R. A. (N. S.), 120, and note.

See, also, *Commonwealth v. Pollard,* 12 Metc. 225, 229.

U. S. v. Shinn, 14 Fed. 447.

Lawrence v. State, 2 Texas App. 479.

U. S. v. Howard, 132 Fed. 325.

Brown v. State, 36 So. 705.

And it is not enough to introduce in evidence the record of the case in which it alleged the false oath was taken. The Government must go farther and introduce evidence showing the materiality of the alleged perjured testimony to the issue involved.

McClelland v. People, 113 Pac. 640, and cases *supra.*

In the instant case not a scintilla of evidence was introduced to show the materiality of the alleged perjured testimony, nor could the fact of materiality be established by the mere opinion of witnesses.

Washington v. State, 5 S. W. 119.
Foster v. State, 22 S. W. 21.

PROHIBITED TESTIMONY — NOT SUBJECT OF PERJURY.

A most serious and fatal error was committed by the Government in compelling Esther Wood to testify against her husband, Jake Gronich, at the pre-

liminary hearing before U. S. Commissioner Cannon, on or about the 9th day of May, 1912, at which time the alleged perjured and suborned testimony was charged as having been given. (See Assignments of Error, Nos. 6 and 7.) The U. S. Commissioner, as well as the Deputy U. S. District Attorney, Maguire, had full knowledge that Esther Wood was the wife of Jake Gronich, as appears in Government Exhibit 3, which is attached to the Bill of Exceptions, and the perjury charged in the indictment to have been suborned was perjury alleged in the indictment to have been committed at the "trial" of Jake Gronich before the U. S. Commissioner.

The rule of practice in the Federal courts for the trial of criminal cases is laid down by Chief Justice Taney in the leading case of *U. S. v. Reid,* reported in 12 Howard, 362, and also in Lawyers' Ed., Supreme Court Records, Vol. 13, 1023. In that case Chief Justice Taney said:

> "All the rules of evidence in criminal cases are the rules which were in force in the respective states when the judiciary act of 1789 was passed. Congress may certainly change it whenever they think proper within the limits prescribed by the Constitution. But no law of a state made since 1789 can affect the mode of proceeding or the rules of evidence in criminal cases."

And in the case of *Logan v. U. S.,* 144 U. S. 263, 36 Lawyers' Ed., 429, at p. 443, Mr. Justice Gray laid down the rule as follows:

> "For the reasons above stated, the provision of Sec. 868 of the Revised Statutes that 'the laws of the state in which the court is held shall be

the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law and equity' and admittedly has no application to criminal trials, and therefore the competency of witnesses in criminal trials in courts of the United States held within the State of Texas is not governed by the statute of the state which was first enacted in 1858, but, except so far as Congress has made specific provisions upon the subject, is governed by the common law, which, as has been seen, was the law of Texas before the passage of that statute, and at the time of the admission of Texas into the Union, as a state."

While the foregoing rule of practice is still in force in Federal courts, Congress has "certainly" (to use the language of Chief Justice Taney) *changed the practice in preliminary hearings of persons accused of crimes against the United States by the enactment of Sec. 1014 of the Revised Statutes of the United States.* That section provides that any offender against the laws of the United States may be arrested, imprisoned or bailed, as the case may be, "agreeably to the usual mode of process against offenders in such state." And this means that in all hearings for the arrest and commitment of offenders against the laws of the United States the then practice of the state court shall be followed.

See *U. S. v. Sauer,* 73 Fed. 671.

U. S. v. Garcelon, 82 Fed. 611.

U. S. v. Rundlett, 2 Curt. (U. S.), 41.

U. S. v. Martin, 17 Fed. 150.

Marvin v. U. S. 44 Fed. 405.

U. S. v. Horton, 2 Dillon (U. S.), 94.

At the time Jake Gronich was arrested for violation of the White Slave Traffic Act, Chapter XXI of Lord's Oregon Laws was in full force and effect. This chapter sets forth the procedure in preliminary hearings of persons charged with crime. The procedure contained in this Chapter XXI of Lord's Oregon Laws would be binding upon the U. S. Commissioner at the preliminary hearing to determine whether or not Jake Gronich should be held for violation of the White Slave Traffic Act.

See *U. S. v. Garcelon,* 82 Fed. 611.

And the laws of evidence applicable to the trial of criminal cases as well as to preliminary hearings would also be binding upon the said commissioner at the said hearing. At the time of the hearing of Jake Gronich for his alleged violation of the White Slave Traffic Act, Sec. 1535 of Lord's Oregon Laws was in full force and effect. It reads as follows:

> "In all criminal actions where the husband is the party accused, the wife shall be a competent witness, and when the wife is the party accused, the husband shall be a competent witness; *but neither husband nor wife, in such cases, shall be compelled or allowed to testify in such cases unless by consent of both of them;* provided, that in all cases of personal violence upon either by the other, the injured husband or wife shall be allowed to testify against the other."

The rule of evidence contained in Sec. 733 of Lord's Oregon Laws, does not apply in criminal proceedings, so that Sec. 1535 governs the trial of crim-

inal actions in the State of Oregon, so far as the testimony of husband and wife is concerned.

See *State v. McCrath,* 35 Or. 1095; 57 Pac. 321.

State v. Luper, 49 Or. 607; 91 Pac. 444.

State v. Luper, 95 Pac. 811.

Basset v. U. S. 137 U. S. 496; 34 Lawyer's Ed. 763.

In re Dana, 68 Fed. 886, at p. 893, Brown, J., said: "The rules of procedure to be followed under Sec. 1014 are those in force in the state at the time and place of the * * * proceeding."

It follows, then, that as the U. S. Commissioner in the hearing of Jake Gronich for violation of the White Slave Traffic Act was bound to follow the law of evidence as to the testimony of husband and wife in criminal cases, as set forth in Sec. 1535 L. O. L., he *exceeded his powers*, and went beyond any authority conferred upon him by law, in *compelling* or *even allowing* Esther Wood to give evidence at the said hearing against her husband, Jake Gronich. It is evident that Esther Wood was an unwilling witness, but even though she were a willing witness, her testimony could not have been allowed according to the statute, unless there was a waiver joined in by herself and her husband; and no such waiver appears. The evidence given by Esther Wood at the hearing that she did not practice prostitution at other places, and that she had no remembrance of the exchange of postal cards with Jake Gronich, was evidence which was absolutely *prohibited* by law, and therefore could form *no basis for a charge of*

perjury or subornation of perjury, even though the testimony given was false.

It is also, of course, axiomatic that *evidence which is prohibited cannot be material,* and inasmuch as it appears that the evidence of Esther Wood was prohibited at the hearing in question, of course it cannot be material, and the prosecution failed because the requirement that the alleged perjured testimony must be material was not established in this as well as in the respects previously argued under the head of "Materiality of the Testimony."

In this connection the case of *U. S. v. Grottkau,* 30 Fed. 672, is instructive. The defendant in the Grottkau case was indicted for perjury, the indictment charging him with falsely swearing that he had resided within the State of Wisconsin for one year next preceding his application for citizenship. Sec. 2165 of the Revised Statutes, relating to the subject of naturalization, in the closing paragraph thereof, provides, among other things, "That the oath of the applicant shall be in no case allowed to prove his residence."

Federal Judge Dryer, in discharging the prisoner, said:

> "Then when we come to the third subdivision, we find that its language is not that he shall declare on oath certain facts in regard to his residence, but that it shall be made to appear to the satisfaction of the court admitting such alien that he had resided within the United States five years at least, and within the state or territory where such court is at the time held one year at least. And the closing sentence in this section declares, without qualification, that the oath of the applicant shall in no case be al-

lowed to prove his residence. This is, in effect, a prohibitory clause forbidding the taking of the oath of the applicant himself as proof of his residence, the evident object of the law being to require other proof than that of the oath of the applicant, upon the subject. This being the statute provision as enacted by Congress, we have to apply it in this case. In the interpretation of the statute, the familiar and elementary principle that to constitute perjury the oath or affirmation must be material, or, as it is stated in the opinion of the court in the case of *Silver v. State,* 17 Or. 368, it must be required by, or have some effect in law. Further, it is elementary that perjury cannot be assigned of an oath that is extra judicial."

The same principle was recognized in the case of *U. S. v. Bell,* 81 Fed. 830.

See, also, *State v. Trask,* 42 Vt. 152.

State v. Furlong, 26 Me. 69.

Collins v. State, 78 Ala. 433.

People v. Fitmus, 102 Mich. 318.

U. S. v. Bedgood, 49 Fed. 54.

U. S. v. Law, 50 Fed. 915.

U. S. v. Howard, 37 Fed. 666.

An indictment based solely on the testimony of wife against her husband was held invalid in *People v. Briggs,* 60 How. p. 217; also in *People v. Moore,* 65 How. p. 177. See *People v. Beadek,* 102 N. E. 243.

And in this connection it is well to note the distinction which exists between an incompetent witness swearing falsely in a proceeding wherein his in-

competency can be waived and his testimony in a case wherein he is *prohibited* from testifying in any event.

See cases cited in *U. S. v. Grottkau,* 30 Fed. 672.

The only exception contained in Section 1535, Lord's Oregon Laws, to the general rule that the husband or wife cannot testify against the other in criminal actions, arises in case there is personal violence used by the husband or wife against the other. And "personal violence" under the statute means direct, forcible, personal violence upon the body of the injured spouse, as distinguished from injury to the marriage relation. The words "personal violence" are to be construed according to the ordinary and commonly understood meaning of the words as used by English speaking people. "Violence" imports active force, and the adjective "personal" used to qualify its meaning in Section 1535, L. O. L., imports that the violence shall be to the person, as distinguished from his abstract or intangible rights.

See *Basset v. U. S.,* 137 U. S. 496; 34 L. Ed. 762.

Also *State v. Woodrow,* 52 S. E. 545; 2 L. R. A. (N. S.) 862.

In *People v. Curiale,* 137 Cal. 538; 70 Pac. 468, the defendant was charged with statutory rape. The statute provided that a husband or wife could testify against the other in cases of "criminal violence upon one by the other," and the attorney general

urged that this case fell within the exception. The Supreme Court of California, speaking through Judge Cooper, said:

> "The crime charged was upon the person of Isabella Petruccelli, and committed before she became the wife of the defendant. Criminal violence upon one by the other *means what it says;* criminal violence upon the wife by the husband, or criminal violence upon the husband by the wife. * * * If the crime charged should be regarded with reference to the person of the wife regardless of the question as to whether she was the wife at the time of its commission, still we do not think it is a case of criminal violence under the statute. The act of having sexual intercourse with a female under the age of sixteen, with her consent, is not an act of criminal violence. It is a crime, because made so by statute."

See also *Miller v. State*, 40 S. W. 313.

Basset v. U. S., 137 U. S. 496; 34 L. Ed. 762.

State v. Burt, 17 S. D. 7; 94 N. W. 409; 106 Am. State Repts. 759 and note.

Brock v. State, 71 S. W. 20; 100 Am. State Repts. 859.

People v. Quanstrom, 93 Mich. 259; 53 N. W. 167; 16 L. R. A. 725.

Commonwealth v. Sapp, 901 Kan. 280; 29 Am. St. Rept. 405.

Stein v. Bowman, 13 Peters, 209; 10 L. Ed. 129.

The statutes of some states allow husband and wife to testify against each other in criminal cases,

when the offense is committed by one spouse against the other without limiting the admissibility to cases of "personal violence." In construing such statutes, the courts have allowed evidence of wrongs by one spouse against the other which were in their nature wrongs against the marital relation, rather than wrongs against the spouse by way of "personal violence."

State v. Chambers, 87 Ia. 1; 53 N. W. 1090; 43 Am. State Reports, 349.

Dill v. People, 19 Colo. 477; 41 Am. St. Rep. 260; 36 Pac. 232.

In the case of the *State v. Chambers, supra,* the Supreme Court of that state makes a distinction between statutes which give the injured spouse the right to testify in cases of "personal violence," as distinguished from statutes which give the injured spouse the right to testify in cases where one spouse commits an offense against the other spouse.

Judge Given, in the above entitled case, said:

"In *Basset v. U. S.,* 137 U. S. 496, a prosecution for polygamy, it was held under the code of criminal procedure of Utah that the offense charged was not such a wrong against the wife as to render her testimony admissible. The exception contained in that code is where the testimony is given with the consent of both 'in cases of criminal violence upon one by the other.' It will be noted that the exceptions in these statutes apply to personal wrong or injury, while under ours they apply to all 'criminal prosecutions for a crime committed by one

against the other.' There are many crimes other than against the person which one may commit against the other."

This case distinguishes cases of "personal violence" from other offenses against the wife or husband, as the case may be.

See, also, *Dill v. People*, 19 Colo. 477; 41 Am. St. Rep. 260.

In *Basset v. U. S.*, 137 U. S. 496, which is a leading case on the subject, the husband was indicted for polygamy, and his original wife appeared against him as a witness. The code in the State of Utah provided that neither husband nor wife could testify against each other "except with the consent of both or in cases of criminal violence upon one by the other." In reversing the judgment of the Supreme Court of Utah, Mr. Justice Brewer said:

"This precise question has never been before this court, but the common law rule has been noticed and commented on in *Stein v. Bowman*, 13 Peters, 209-222, in which Mr. Justice McClean used this language: 'It is, however, admitted in all the cases that the wife is not competent except in cases of violence upon her person, directly to incriminate her husband or to disclose things that she has learned from him in their confidential intercourse. * * *' (Is polygamy such a crime of criminal violence against wife?) That it is no wrong upon her person is conceded, and the common law exception to the silence imposed upon the lips of husband and wife is only broken, as we have noticed, in cases of assault upon one by the other. That there is

humiliation and outrage upon her is evident. If that is the test, what limit is imposed? Is the wife not humiliated? Is not her respect and love for her husband outraged and betrayed when he forgets his integrity as a man, and violates any human or divine enactment? Is she less sensitive, is she less humiliated, when he commits murder or robbery or forgery, than when he commits polygamy or adultery? A true wife feels keenly any wrong of her husband, and her loyalty and reverence are wounded and humiliated by such conduct. But the question presented by this statute is not how much she feels or suffers, but whether the crime is one against her. Polygamy and adultery may be crimes which involve disloyalty to the marital relation, but they are rather crimes against such relation than against the wife; and as the statute speaks of crimes against her, it is simply an affirmative of the old, familiar and just common law rule. We conclude, therefore, that under this statute the wife was an incompetent witness against her husband."

The only case which we have been able to find in opposition to the foregoing authorities is that of *U. S. v. Rispole*, 189 Fed. 271, a decision of the District Court for Pennsylvania, where the wife was allowed to testify against the husband in a case where he was charged with violating the White Slave Traffic Act. This case arose in the Pennsylvania District. The argument of the learned U. S. District Attorney of that district is set forth in full in the report of the case probably to strengthen and show the reasons for the opinion of the court, which is extraordinarily short, considering the departure of this case from the well settled rules of law, as laid down in the foregoing cases. The famous Lord Audley's case, in the House of Lords in 1613, reported in

3 Howell's State Trials, p. 401, is referred to in that case. Lord Audley, it will be recalled, procured the commission of a rape upon his wife, and of course this was an act of hideous personal violence, and to allow the wife to testify under such circumstances would be no exception to the general rule laid down in all the foregoing cases; and if a case should arise wherein a husband should force his wife, by means of physical violence, to live a life of prostitution, this act of the husband might well be construed as an act of personal violence.

But if a moral degenerate should marry a prostitute, and should aid and assist her in plying her trade, and should act the part of pimp or procurer, under such circumstances it cannot be said that the degenerate husband, vile though his crime may be, is committing any act of personal violence upon his prostitute wife, for she consents to the act, and there is no question of personal violence involved. If the husband should send his wife out as a shoplifter to support him, that act would not be an act of physical violence against the wife unless he used actual force in sending her out. If she went out of her own free will, it could not be said that there was any physical violence in the case, for the reason that she consented. *Velenti non fit injuria.* Lord Herschell, in *Smith v. Baker,* 60 L. J. 2, p. 70, said: "One who has invited or assented to an act being done towards him cannot, when he suffers from it, complain of it as a wrong." And to the same effect see

Goldnamer v. O'Brien, 33 S. W. 831.

People v. Cundle, 137 Cal. 538; 70 Pac. 470.

Miller v. State, 40 S. W. 313.

It is submitted, therefore, that the Pennsylvania court in reaching such a conclusion betrayed a gross misconception of the clear distinction between "personal violence" and willing compliance.

On this general proposition we take the liberty of citing the views of a non-legal authority on the sociological phase, since they are instructive, and we submit pertinent, in that it is a canon of construction that statutory words are to be given their ordinary signification. We quote an interview with A. W. Elliott, president of the Southern Rescue Mission and editor of the Young Woman's Magazine, which appeared in the "Oregonian" of November 18, 1913, published in Portland, Oregon. His statement is as follows:

> "We frankly say there never was a joke of more huge proportions perpetrated upon the American public than this white slave joke. I surely do not believe that there are a dozen girls in America today that are in houses of ill-fame that could not walk out if they wanted to. They love that kind of life and will scoff at the reformer and even kick him if he does not get out when asked to.
>
> "I could go into detail, writing hundreds of pages of my various efforts to redeem them, but it would be useless waste of time; it is only necessary to tell you that women of the underworld will not reform, and there is positively no use in wasting your money on them. I have positively entered at least two thousand houses of ill-repute and have talked face to face with possibly fifteen thousand of these women, and I pledge you truthfully that I know them just as you know your own little children, and I do not hesitate to tell you that they are wedded to their

ways and that they laugh at and make fun of those who try to help them."

Whether there is personal violence in any case is a question of fact. Esther Wood, in the preliminary hearing before U. S. Commissioner Cannon, when her husband, Jake Gronich, was the defendant charged with violation of the White Slave Traffic Act, testified to no personal violence committed upon her by her husband; and even if she had testified that Jake Gronich had transported her to the State of Oregon for the purpose of prostitution, no "personal violence" could be predicated on such an act, certainly in the absence of duress on his part.

For this reason we believe that the case of *U. S. v. Rispole, supra,* will not be followed by this court, or by any court which makes a study of the law as it is. If Congress wishes to allow married prostitutes to testify against their husbands under such circumstances, all that is necessary to do is to amend the White Slave Traffic Act. But until Congress takes action upon the matter, the courts should follow the law according to its principles as it has been laid down. See in this connection

Goldnamer v. O'Brien, 33 S. W. 831.

Also *State v. Moore,* 45 Tex. Cr. App. 234; 2 Am. & Eng. Ann. Cases, 878.

It follows that Esther Wood, being a prostitute from choice, and there being no evidence of physical violence upon her, she was *prohibited* by Sec. 1535, Lord's Oregon Laws, from giving testimony against her husband, Jake Gronich, at the preliminary hear-

ing before U. S. Commissioner Cannon for violation of the White Slave Traffic Act; and any evidence given by her at the said hearing against her husband, even though false, the same being *extra judicial* and of no legal effect, could not be used as evidence to prove a charge of perjury or of subornation thereof.

EFFECT OF COERCION OF WITNESS.

(See Assignment of Error No. 8.)

It appears from Government Exhibit 3 that Esther Wood was an unwilling witness. At the outset of her examination she refused to testify, and it was only after repeated threats of holding her for contempt that she was induced to give evidence at the hearing. It is obvious from a reading of this exhibit that coercion was used, as is evidenced by the following extract:

"Mr. Cannon (speaking to Esther Wood): You understand you can be punished for your attitude?

A. Yes, sir.

Q. Do you prefer to be punished and kept in jail rather than testify?

A. Yes, sir.

Q. Very well, then, Miss Wood, this is probably what will happen to you unless you do testify. You will probably have to go to jail for an indefinite time, if you prefer to do that rather than answer simple questions.

* * * * * * *

Mr. Maguire: Q. What is your name?

A. I refuse to talk. I told you once.

Q. How old are you? Do you refuse to answer that? Where have you lived in the last two years? Do you refuse to answer that question also?

A. Yes, sir.

Q. On what ground?

Mr. Cannon: I don't think there is any use in pursuing this hearing any further. I think I will—

Mr. Stephenson: I would like permission, if Your Honor please, to ask the witness one question.

Mr. Maguire: If the court please, I object to that. The Government, I think, has subpoenaed this witness, and as she has refused to testify, there is no chance for any cross-examination.

Mr. Cannon: I presume that is technically correct, although I don't care to put an incompetent witness in jail, if she is, as a matter of fact, incompetent.

* * * * * * *

Q. Where have you lived in the last two or three years?

A. I refuse to answer any further. I will answer all questions as soon as I have seen my attorney. I haven't talked to him. I was very ill. I didn't talk to him.

Mr. Maguire: Her attorney has been notified of the time of the hearing and he has already told Mr. Pray and myself over the telephone that he had advised her to tell the truth about the matter, so there is no excuse for her attitude.

Mr. Cannon: If she is incompetent, there is no use for me to commit her.

Mr. Maguire: She is not incompetent. I believe

counsel's position is this: that she is incompetent to testify against this defendant because there may be a marriage relation claimed between them.

Mr. Cannon: I understand that is the rule.

Mr. Maguire: I think, if the court please, that I will ask for a continuance of this case pending some decision one way or the other as to her being competent, and it may be quite likely she will change her mind when she understands more fully.

Mr. Cannon: I think she will. I will continue the case and you can call it up at any time you see fit.

Mr. Cannon: I will do this. I will take the case under advisement, and this witness will be committed to the county jail pending a decision in the matter, and I don't know just when I will be able to decide it, and her bond will be fixed at $2,500."

Mr. Maguire was Deputy United States District Attorney.

Thereafter the witness, Esther Wood, gave her testimony at the preliminary hearing, as appears from Government Exhibit 3.

All through the testimony contained in Government's Exhibit 3 the witness was browbeaten and threatened. As we have already pointed out, the Government had no authority to examine this witness at all, or require her to testify against her husband, neither had it any right to compel her to incriminate herself or give testimony which might incriminate her. For her to practice prostitution, even at the instigation of her husband, would constitute, under the laws of most of the states, the crime of adultery, and she had the right to be silent upon this matter if she wished.

In the case of *U. S. v. Bell,* 81 Fed. 830, the rule is laid down by Judge Hammond that when a witness has the right of refusing to give evidence, under the Fifth Amendment to the Constitution of the United States which prohibits forced self-incrimination, compelling testimony, even though false, is not sufficient ground to sustain a charge of perjury or of subornation of perjury.

See *Brown v. Walker,* 161 U. S. 591.

Pipes v. State, 9 S. W. 614.

Wigmore on Evidence, Sec. 2251.

CONCLUSION.

This case presents phases somewhat unusual. The defendant is a practicing attorney in Portland, Oregon. He was called from his office to see this woman, Esther Wood, at the Oxford Hotel. He had never seen her before, and received no compensation from her. He had no motive or purpose in advising her to commit perjury. He was not interested in, nor was he the attorney for, her husband. He innocently walked into a trap when he went into room 3 of the Oxford Hotel on the afternoon of May 7, 1912, between the hours of five and six. He was alone. The prostitutes numbered four. One of them, Esther Wood, was interested. She was the only one who had any interest in Jake Gronich, and evidently, after her arrest and incarceration for seven months, she had some interest in her own fate, as she had been indicted for perjury, alleged to have been committed at the preliminary hearing before the Hon.

U. S. Commissioner. With two of the prostitutes to aid her, it was not strange that she should make Max G. Cohen the scapegoat and load her sin upon him. The following questions and answers in the cross-examination of Esther Wood by Mr. Ralph E. Moody may throw a sidelight on some things that might influence her to save herself:

"Q. Well, and how was it that you happened to tell Mr. Maguire that Mr. Cohen told you to do this?

A. Why, because it is the truth.

Q. I know; but what occasioned you to tell Mr. Maguire that?

A. Well, he told me that if I told him—he told me that they were going to sentence me to Lansing —to Kansas—he told me I was to be sentenced to Lansing, Kansas,—to the penitentiary, and I said, 'Yes, can I plead guilty right away?' and he said, 'You have to wait for the grand jury'; and I told him, I said, 'Yes, I will plead guilty,' but I said, 'I was forced to do so,' and he asked me then and I told him that I took Max Cohen's advice. They never brought me on to plead guilty, saying I would have to wait for the grand jury, and I have never pleaded guilty. I told them and admitted that I was guilty of lying, but that I was forced to do so. I don't remember for sure when I was indicted by the grand jury, but I think it was right after my husband was sentenced to the penitentiary, or it was before.

Q. Why has not your case been brought on for trial?

A. Why, I was to wait for the grand jury, I think.

Q. Well, I know, but the grand jury indicted you

some several months ago. Now, why hasn't your case been brought on for trial?

A. It is on trial now, isn't it? It is on trial now. This is the trial now.

Q. You imagine this is your trial here?

A. I don't know. I don't remember the district attorney saying anything to me about the trial of my case; they subpoenaed me two weeks ago. I had a talk with them when I got out on bonds and they told me I wasn't to go away from Portland, and that I was under bonds, and they told me I was under bonds for Max Cohen's trial. I guess he was up for perjury, too. They didn't tell me when my case was to be brought on for trial. I don't know whether I have had any understanding with the Government about my case. I am held as a witness now. I agreed to plead guilty before I was indicted. I had no understanding with them in regard to pleading guilty after I was indicted. Mr. Pray and Mr. Maguire came and talked to me about my swearing falsely; they all told me that I swore falsely after I got off the stand, and they had conversations with me in the court house several times. I first told them about Mr. Cohen giving me advice when they sentenced my husband, which was two months after I had testified. The way I happened to tell them that was that I saw in the paper that I was up for lying, for perjury, and I went down and asked if I could plead guilty, and told them I had lied and was forced to do so by my lawyer, Max Cohen. The Government has not promised me anything in regard to my case, and I have no understanding with them. I don't know whether I will be prosecuted for perjury. I lied, but I was forced to do so. I have been

indicted, but I have not pleaded guilty and I am out on $50 bail. I was indicted for perjury, and they told me they would dismiss it on my own recognizance, but that I wasn't to go away. I am quite sure they used the word dismiss. The man who came down and said I would be let out on my own recognizance was Mr. Duke, from the marshal's office. When I talked with Mr. Evans, and told him in answer to his question, that I wouldn't run away, he said he would try to put my bond as low as he could, and asked me if I could put up $50. I told him yes, that was all I had. I don't quite remember what Mr. Evans said about dismissing. I didn't have any talk with Mr. Maguire or Mr. Mowry when I went out. I just spoke to Mr. Mowry about my case Saturday, and never saw him before then; I didn't talk with anybody else nor with Mr. Maguire. The only time I have talked with Mr. Maguire since I have been in jail was when I went down to plead guilty, and told him about Mr. Cohen telling me to deny that I had ever sported. I don't remember talking to anybody after Mr. Maguire. I talked to Mr. Pray once afterwards, but not the same day. I have talked to Mr. Pray a great many times. He was at the jail quite a few times, but not exactly to see me, and I spoke to him then. Mr. Pray didn't advise me to testify against Mr. Cohen, and nobody else said anything to me about it. I said that 'when I was going to plead guilty that I was going to say that I wasn't the cause of it, because I was forced to do so.' I didn't know whether I expect to be sent to the penitentiary, but I know I am not afraid. I have no promise from the government. I don't know whether I will be sent to the penitentiary."

The interest of Esther Wood was adverse to the defendant. Although a confessed perjurer herself, for the sake of immunity and to avoid the imprisonment at Lansing threatened by the Government officials, she became the Government's informant and witness in chief. The Government officials were very lenient to this witness. Her bail was fixed at $50, while the defendant was required to put up $10,000. The witness testified that she was not afraid and spoke of conversations with Mr. Evans regarding the dismissal of the proceedings against her. (See Record, page 31.)

After Esther Wood had been liberated on $50 bail, we find, on page 33 of the Record, the following testimony given by her:

"I was convicted once in the police court of prostitution and pleaded guilty. They had me up for vagrancy. I have been sporting ever since they turned me out of jail. I pleaded guilty. That was since they let me loose from jail up here. They arrest all prostitutes as vagrants. I am now living in a house of ill-fame. I first reported to the Government pretty often, and I think they know I am down in a house of prostitution."

We find Rose Heller testifying as follows:

"I haven't done anything for a whole year nearly. I have been sick. I have been living at the Oxford, but I have now moved to the Levens, and I have not been sporting for over a year."

And Violet Wood says (page 40, Record):

"I am a prostitute and live at the Levens Hotel."

With such witnesses and under threats of sending one of them to Lansing, the Government has pursued the defendant with unflinching zeal.

Water cannot rise above the source, and the probability of the defendant's guilt cannot rise higher than the probability of the truth of the testimony of the foregoing prostitutes. There is no proof of the defendant's guilt in this case, or proof of the *corpus delicti* except by the testimony of these women. If the *corpus delicti* was proved by evidence *aliunde,* then circumstantial evidence might enter into the case, but here we have a conviction based on the credibility of these three women of the underworld, and the chief one of them directly interested in the conviction of the defendant.

It is not enough in this case that the defendant was found guilty by the jury. That does not settle the ultimate fact of his guilt. He must have been found guilty according to law, and then he is, in any event, considered legally guilty. We think we have shown in this brief that serious error was committed, and we have referred to the character of the witnesses in order to throw a sidelight on the entire case and the nature thereof.

It follows from the foregoing reasons that the judgment of the lower court should be reversed, because—

1. The indictment is defective in that it is shown on the face thereof that the U. S. Commissioner had no jurisdiction to try the issue of whether or not Jake Gronich violated the White Slave Traffic Act.

2. No *prima facie* case was made out, for it was not shown that the defendant had any particular proceeding or person in view at which or before whom Esther Wood should give false testimony, and all the evidence of the conversations at the Oxford

Hotel on the afternoon of May 7, 1912, fails to show any subornation of perjury.

3. The materiality of the alleged false testimony, to-wit, the prostitution of Esther Wood prior to the preliminary hearing of Jake Gronich and the alleged false testimony given by her about the postal cards, ~~were~~ not shown.

4. Esther Wood was prohibited from testifying against her husband by the state law, Sec. 1535 L. O. L., and perjury or subornation of perjury cannot be predicated upon testimony given under such circumstances.

5. Testimony obtained under duress or by force from a witness rightly entitled to and claiming the privilege of silence is not such testimony as will form the basis of a perjury or subornation of perjury charge.

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R. E. MOODY,

Attorneys for Defendant-Appellant.

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No. 2339

IN THE

United States Circuit Court of Appeals

NINTH CIRCUIT

UNITED STATES OF AMERICA,
Respondent,

vs.

MAX G. COHEN,
Defendant and Appellant.

BRIEF OF RESPONDENT.

STATEMENT OF FACTS.

The appellant Max G. Cohen, an attorney of Portland, Oregon, was indicted on November 23, 1912, by the United States grand jury for the District of Oregon; thereafter, the said criminal action came regularly on for trial before a court and jury, the Honorable R. S. Bean, Judge, presiding; on June 4, 1913, he was duly convicted by the verdict of said jury, and thereafter was sentenced by said court to serve a term of two years in a federal prison and

to pay a fine of $100.00; it is from this judgment that this appeal is prosecuted.

Upon the trial it appeared in evidence that one Jake Gronich and another were arrested on May 7, 1912, charged with violating the White Slave Traffic Act, alleged to have been committed in procuring and causing the transportation of one Esther Wood from Cleveland, Ohio, to Portland, Oregon, for the purpose of prostitution and debauchery.

The said Esther Wood testified at the trial that she was the wife of Jake Gronich and that she was not present at the time the arrest was made. She returned to the hotel at which she and Gronich were stopping and, learning of the arrest, went to another room. The defendant was called from his office to consult with the said Esther Wood and three other prostitutes, and went to the room where these women were. He knew that Gronich had been arrested and had been charged with white slavery, and admitted under oath at the trial that he knew that the prosecution was to be had before the federal authorities. In this room the defendant was advised by Esther Wood that she was a prostitute and that she had practised as such in Denver, Colorado, in Baker City, Oregon, and in Portland, Oregon, being the places from which, through which and to which the Government charged that she had been transported for the purpose of prostitution and de-

bauchery. In the face of this knowledge, Cohen advised Esther Wood to testify that she had never practised prostitution in Denver, or in Baker City or in Portland, or in any other place in the United States. The defendant asked Esther Wood if the officers were in possession of any letters passing between her and Gronich, to which she replied there were some post-cards in her trunk, and the defendant advised her that if these were shown to her to say that she did not remember them and to deny any knowledge of them. Another girl had been transported at the same time and for the same purpose, and Esther Wood raised the question as to what she should do in the event that this other girl told the truth as to the prostitution of Esther Wood. The defendant advised Esther Wood that if such a state of affairs should exist and such testimony be given by the other girl that she, Esther Wood, was to say that the said prostitution was without the sanction of Gronich and was upon the own volition of Esther Wood, but not to say this until such time as it was certain that the other girl had given such information.

Esther Wood appeared as a witness before the United States Commissioner, at which place a hearing was had to determine whether or not Gronich should be held to answer to the grand jury. The defendant was present, represented the said witness as her counsel at said hearing, and heard her tes-

tify as he had advised her to do. At one of the adjournments of the court, in a conversation with her, he approved of the testimony that she had given.

It is admitted that the testimony of Esther Wood was wilfully and knowingly false, untrue and perjured, and the testimony of the government witnesses was directly to the point, that the defendant knew it was false and perjured and counseled the witness, Esther Wood, to give such testimony and was present at the time the perjured testimony was given. Gronich was held to answer, was later indicted, plead guilty and was sentenced to prison. Esther Wood was indicted for perjury, and the defendant Cohen indicted for subornation of perjury.

By their brief counsel for the appellant Cohen, have assigned many alleged errors. These alleged errors are here set forth in the order in which they are taken up in the brief and in which they will be answered. The errors assigned are substantially as follows:

1. Overruling the demurrer to the indictment because the indictment in some phases used the words "trial" and "issue" in describing the hearing and the determination thereof before the United States Commissioner (Transcript of Record, p. 81).

2. Refusal to grant a motion for a directed verdict of acquittal on the grounds that there was no

evidence that the defendant advised and procured Esther Wood to give false testimony in any judicial proceedings, but only to non-judicial officers of the government. (Transcript of Record, p. 81.)

3. That the court admitted in evidence certain immaterial testimony, upon which there could not be predicated, but on which the government did predicate the crime of perjury, and subornation of perjury. These instances are four in number:

(a) Admission in evidence of the Commissioner's complaint against Jacob Gronich, the husband of Esther Wood.

(b) Admission in evidence of the testimony of Esther Wood, given in the preliminary hearing before the United States Commissioner, in which she denied having ever practised prostitution anywhere in the United States.

(c) Admission in evidence of the postal-cards, which were sent and received by Esther Wood, and of which she denied having any recollection at her preliminary hearing.

(d) Admission in evidence of all the testimony of Esther Wood, who was the wife of Jake Gronich, on the grounds that said evidence was privileged and the privilege not waived.

4. The court erred in giving the following two instructions:

(a) That the fact Esther Wood was the wife of Jake Gronich is immaterial upon the charge of his violation of the White Slave Traffic Act, or upon this inquiry, subornation of perjury.

(b) That the fact Esther Wood was coerced into testifying against her husband by threats of being put in jail for contempt, is not material in this case.

The fourth division of errors consisting of the two instructions of the court, may properly be consolidated and their justification determined by the authorities which determine whether Esther Wood's testimony was material and admissible against her husband. (3 d.)

This leaves six alleged errors in the trial of this cause.

ANSWER TO ASSIGNMENTS OF ERROR.

I.

The trial court did not err in overruling the demurrer to the indictment on the grounds that the indictment used the words "trial" and "issue" in alleging the hearing before the United States Commissioner, in which the perjured testimony was given, because there was no extra-judicial proceeding

had or oath administered; the crime with which the defendant was charged, was sufficiently described in the indictment so that no prejudice occurred and all irregularities, if any, are cured by statute.

II.

The trial court did not err in refusing to grant a motion for a directed verdict,, which was made by the appellant at the close of all the evidence introduced upon the trial, for the reason that the evidence introduced by the government in support of its contentions, was sufficient to prove the commission of the crime alleged and was contradicted by evidence of the defendant. Thus an issue of fact was created, which must be submitted to the jury.

III.

The trial court did not err in admitting the following evidence:

(a) The United States Commissioner's complaint against Jacob Gronich, or

(b) The preliminary testimony of Esther Wood, or

(c) The postal cards received and sent by Esther Wood, because they were material in

proving the elements necessary to show a violation of the White Slave Traffic Act by Jacob Gronich, and with respect to which Esther Wood was advised, instigated and caused to testify falsely by the defendant Cohen.

IV.

The trial court did not err in admitting the testimony of the witness, Esther Wood, given at the preliminary hearing against her husband, Jacob Gronich, which was objected to by appellant, because such testimony is not privileged under the issues presented in such a case, and the court's instructions assigned as errors, numbers seven and eight, are correct declarations of the law.

POINTS AND AUTHORITIES.

I.

The indictment is sufficient when as in this case (1) it sets forth with clearness and exactness the proceedings in which the perjury instigated by the defendant was committed; (2) the facts relative to the defendant's subornation of the material witness, and (3) when the defendant is apprised of the charge against him.

United States vs. Cruikshank (1875), 92 U. S. 542, 568.

Rosenfeld vs. United States (C. C., 7th, 1912), 202 Fed. 469, 473.

The proceeding before the United States Commissioner is sufficiently described so that the verbiage of the words "trial" and "issue" are matters of form only, and the indictment is sufficient for all purposes when it states the essential facts which constitute the crime, in language which leaves no doubt in the mind of the defendant of what he is accused.

Markham vs. United States (1895), 160 U. S. 319, 324.

United States vs. Swift (D. C. Ill., 1911), 188 Fed. 92, 98.

The fact that the word "issue" is used with respect to the determination of the United States Commissioner's hearing, is not prejudicial to the defendant, because the Commissioner does determine both the issue of whether the crime charged has been committed, as well as the issue of whether there is probable cause to believe the accused did it.

United States vs. Greene et al. (D. C. N. Y. 1900), 100 Fed. 941, 944-5.

Latimer vs. State (1898), 55 Neb. 609, 612.

Reference is hereby made to Section 1795 of Lord's Oregon Law:

> "If, however, it appear from the examination *that a crime has been committed,* and that there is sufficient cause to *believe the defendant guilty thereof,* the magistrate must make a written order, signed by him, to the following effect: 'It appearing to me from the testimony produced before me on the examination, that the crime of (designating it generally) has been committed, and that there is sufficient cause to believe A. B. guilty thereof, I order him to be held to answer the same.' " (Italics ours.)

The variance between the words "trial" and "issue" and the true description of the hearing before the commissioner is nothing more than verbiage, and since no showing is made as to how the misdescription, if any, ever embarrassed the defendant, it is cured by statute.

> Hoke vs. United States (1912), 227 U. S. 308, 324.

And since this assignment of error goes to matters of form only, and has worked no injustice to the defendant it is cured by the following adjudicated statute:

"No indictment found and presented by a grand jury in any district or circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant."

Sec. 1025 Revised Statutes of the United States.

Hedderly vs. United States (C. C. 9th, 1912), 193 Fed. 561, 565.

II.

In the trial court, in a criminal case, if the evidence for the government, which is assumed to be true in fact, together with all reasonable inferences therefrom, is not legally sufficient to support a verdict of guilty, it is the duty of the trial court on being moved thereto, to direct a verdict of not guilty.

Crumpton vs. United States (1891), 138 U. S. 361, 363.

France vs. United States (1897), 164 U. S. 676, 681.

Duff vs. United States (C. C. 4th, 1911), 185 Fed. 101, 102.

But since there is no authority in the Circuit Court of Appeals to inquire into either the *sufficiency* or *weight* of evidence, the three objections (a), (b) and (c) out of the four assigned of error on page 4 of appellant's brief, are not well taken.

Wiborg vs. United States (1895), 163 U. S. 632, 659.

Hedderly vs. United States (C. C. 9th, 1912), 193 Fed. 561, 571.

The Circuit Court of Appeals in considering a motion for directed verdict in the trial court can determine only the question of whether there is *any* evidence to sustain the verdict.

Hedderly vs. United States (C. C. 9th, 1912), 193 Fed. 561, 571.

And this determination must be made from all the evidence admitted in behalf of either the plaintiff or defendant.

Burton vs. United States (C. C. 8th, 1906), 142 Fed. 57, 59.

Stearns vs. United States (C. C. 8th, 1907), 152 Fed. 900, 905.

In so determining whether there is any evidence to sustain a verdict the appellate court need only ascertain from the record whether there is *any* evidence which, if credited by the jury, is sufficient to sustain the verdict.

> Boren vs. United States (C. C. 9th, 1906), 144 Fed. 801, 804.

There is a sufficiency of evidence to meet this requirement.

> Transcript of Record, pp. 21-23.

It seems that a conviction for the crime of subornation of perjury could be sustained upon the uncorroborated testimony of one witness.

> Boren vs. United States (C. C. 9th, 1906), 144 Fed. 801, 805.

But in the case at bar there were three witnesses who testified to the facts upon which this crime is predicated, and the sufficiency and weight of the evidence is for the jury.

> Hoke vs. United States (1912), 227 U. S. 308, 324.

And the jury passes upon the credibility of the witnesses.

United States vs. Brown (1846), Fed. Cas. No. 14,667.

III.

The following evidence was admissible and material, by the following authorities:

(a) The Commissioner's complaint against Jacob Gronich was admissible and material, because no one can be guilty of subornation of perjury unless some one is guilty of perjury.

Epstein vs. United States (C. C. 7th, 1912), 196 Fed. 354, 356.

United States vs. Howard (D. C. Tenn., 1904), 132 Fed. 325, 333-336.

The indictment charging subornation of perjury must necessarily set forth within itself all the essential averments concerning the perjury of the witness suborned, just as though the witness were accused by the same indictment of the perjury therein alleged.

United States vs. Howard (D. C. Tenn., 1904), 132 Fed. 325, 336.

In accordance with the above rules the indict-

ment herein charged Esther Wood with the crime of perjury committed before the United States Commissioner on the preliminary hearing of the case of United States vs. Jacob Gronich.

Transcript of Record, pp. 1-3.

To prove the allegations of the complaint and the materiality of Esther Wood's testimony, this complaint was admissible.

(b) Under the above authorities the testimony of Esther Wood, given at the preliminary hearing was admissible to prove that she was the one transported, and that she had practised prostitution.

(c) The postal cards sent and received by Esther Wood were admissible and material under the above authorities to prove the familiarity between Jacob Gronich and Esther Wood, and that she had been in the cities and states, names of which were thereon postmarked.

(d) Appellant contends that perjury cannot be predicated upon prohibited testimony, and that the testimony of Esther Wood, as the wife of Jacob Gronich, was prohibited by Section 1535 of Lord's Oregon Law, which has been adopted as a rule governing the qualifications of witnesses appearing before a United States Commissioner, by Section 1014,

Revised Statutes of the United States.

Answering this latter contention (d), it will be shown:

First. There are but two methods of adopting the state statute for the purpose of defining the qualifications of witnesses appearing before the United States Commissioner, and that neither has been used or applied in this case.

The law which governs the admissibility of testimony (therefore governs who shall be competent witnesses) in criminal cases must be determined (*a*) from the law of the state as it was when the courts of the United States were established by the Judiciary Act of 1789, and no law of a state made since 1789 can affect the qualifications of witnesses in United States courts (*b*) unless further sanction to the application of state law is authorized by Congress.

United States vs. Reid et al. (1851) 53 U. S. (12 How. 361) 360, 363.

(*a*) Since the country now inclosed by the boundaries of the State of Oregon was not even a territory of the United States in 1789, and not admitted to the Union at that date, there were no rules governing competency of witnes-

ses which could be adopted, as suggested by the above adjudication.

Admission of Oregon, Act of February 14, 1859, Ch. 11, 11 Stat. L. 383.

(*b*) Appellant claims (Brief, p. 50) that further sanction to the adoption of state laws (Section 1535 L. O. L., enacted in 1864, prohibiting a wife or husband from testifying against the other, unless by consent of both, or in case of personal violence) has been made by Congress through the enactment of Section 1014, Revised Statutes, which provides as follows:

> "For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge of a supreme or a superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any state where he may be found, and agreeable to the usual *mode of process* against offenders in such state, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United

States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case. And where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the marshall to execute a warrant for his removal to the district where the trial is to be had." (Italics ours.)

(*i*) This section makes the Commissioner's proceedings "agreeable to the usual mode of process against offenders" in the local state of the Commissioner, when those offenders are "arrested and imprisoned, or bailed, as the case may be," and relates only "to preliminary examinations before a justice, judge or United States Commissioner for the purpose of issuing a warrant and holding to bail for appearance at court to answer to an indictment presented by a grand jury or to an information filed by the United States attorney * * *"

United States vs. Baumert et al. (D. C. N. Y., 1910) 179 Fed. 735, 742.

United States vs. Dunbar et al. (C. C. 9th, 1897) 83 Fed. 151, 154.

(*ii*) The expression "mode of process" has a judicially defined meaning, which does not include competency of witnesses, but relates to *procedure* before the United States Commissioner.

United States vs. Rundlett (1854), 2 Curt. 41, 48; Fed. Cas. No. 16,208.

United States vs. Patterson (1893), 150 U. S. 65, 67.

United States vs. Martin (D. C. Ore., 1883), 17 Fed. 150, 155.

United States vs. Sauer (D. C. Tex., 1896), 73 Fed. 671

And in the hundred and fifty reviewed adjudication of this section there is no mention, or even suggestion that this section applies to qualifications of witnesses appearing before the Commissioner.

(*iii*) Therefore, Section 1535 L. O. L., cannot be adopted as a rule for the qualifications of witnesses in criminal proceed-

ings before the United States Commissioner.

Second. The authorities cited in this division confirm the admission of the testimony of the wife, Esther Wood, on the grounds of an exception to the common law rule that a wife cannot testify for or against her husband, which exception is as well established as the rule itself.

The testimony of the wife, Esther Wood, was admissible against the husband, Jacob Gronich, in his hearing for a violation of the White Slave Traffic Act, by the following authorities:

(a) The competency of witnesses in criminal trials in courts of the United States, when not governed by the adopting of state rules under the Judiciary Act of 1789 and not affected by express statutes enacted subsequently, is governed by the common law.

Logan vs. United States (1892), 144 U. S. 263, 303.

(b) General rule: At common law upon grounds of public policy the husband and wife were not permitted, even by consent of the other, to give evidence for or against the other, or to testify, even after the ending of the mar-

riage relation by death, or full divorce, to private communications which took place between them while it lasted.

Coke's "Commentaries on Littleton" (1628), 6 b.

Bassett vs. United States (1890), 137 U. S. 496, 505.

Hopkins vs. Grimshaw (1897), 165 U. S. 342, 349.

(c) This rule was based upon the following reasons:

(*i*) The "metaphysical fiction" that a man and wife are "*duae animae in carne una.*"

Coke's "Commentaries on Littleton" (1628), 6 b.

1 Wigmore "Evidence" p. 729; Sec. 601.

(*ii*) Marital identity of interest.

1 Wigmore "Evidence" p. 729; Sec. 601.

So far as "interested" parties are disqualified from being witnesses, this has been abrogated by statute.

Sec. 858 R. S.

(*iii*) Strong bias of feeling toward each other.

Johnston vs. Slater (1854) 11 Grat. 321, 323.

(*iv*) Public policy in avoiding the danger of disturbing the marital peace.

Kelley vs. Proctor (1860) 41 N. H. 139, 142.

Of these four mentioned reasons the principal one is that public policy prohibits prejudicing or violating the marital peace and happiness.

1 Wigmore "Evidence" p. 730, Sec. 601.

Kelley vs. Proctor (Supra).

(d) But when the above reasons for the common law rule are absent and the following considerations occur, the rule is relaxed and certain well established exceptions occur and these have been acquiesced in by a long line of decisions.

1 Wigmore "Evidence" Secs. 612, 2239.

Bassett vs. United States (1890) 137 U. S. 496.

Hopkins vs. Grimshaw (1897) 165 U. S. 342, 349.

(e) The exceptions to the rule, to-wit, cases in which the wife can, during marriage, or after, testify as to circumstances occurring during the marital relations, and which are ordinarily privileged, are as follows:

(*i*) Actions by the husband upon the wife, which are injurious to her, or the exercise of personal violence upon her.

Mr. East, "1 East Pleas of the Crown," 455.

Wigmore "Evidence" Secs. 612, 2239.

Basset vs. United States (1890) 137 U. S. 496, 505.

United States vs. Rispoli (D. C. Penn., 1911) 189 Fed. 271, 273.

(*ii*) The necessity of avoiding the extreme injustice to the excluded spouse, which would ensue from an undeviating enforcement of the common law rule.

Wigmore "Evidence" Secs. 2236, 612.

This necessity is described as: "Not a

general necessity as where no other witnesses may be had, but a particular necessity, as where for instance, the spouse would be exposed, without remedy, to personal injury or brutal treatment." Lord Mansfield.

Bentley vs. Cooke (1784), 3 Dougl. 422.

ARGUMENT.

I.

No Error in Overruling the Demurrer.

Appellant claims error in overruling the demurrer because the indictment against him alleges there was the "trial" of an "issue" before the Commissioner, when in fact the Commissioner has no jurisdiction to try an issue.

In the following selected portions of the indictmetn there will be found a clear, true and sufficient statement of the hearing before United States Commissioner, which does not mention any "trial," but refers generally to an issue and properly so. The indictment against Max G. Cohen does allege:

"That on, to-wit, the 9th day of May, 1912,

there came on * * * before the Honorable Anderson M. Cannon, United States Commissioner for the District of Oregon * * * a certain charge and complaint then and there pending before the said United States Commissioner against him, the said Jake Gronich, for a violation of the White Slave Traffic Act. * * * the defendant herein, Max G. Cohen, * * * did unlawfully, knowingly, feloniously and corruptly procure, advise, obtain and suborn one Esther Wood * * * to give in evidence before the said United States Commissioner certain matters material and relevant to the issue * * * And that afterwards * * * the said issue was * * * heard before said United States Commissioner, and the said Esther Wood * * * was duly sworn by the said United States Commissioner, who was then and there an officer authorized by the laws of the United States to administer oaths, and took her oath as such witness before the said United States Commissioner that the evidence which she, the said Esther Wood, would give at said * * * hearing, would be the truth, the whole truth and nothing but the truth; and it did then and there upon said * * * hearing, become and was a material inquiry whether she, the said Esther Wood, had ever practised prostitution," etc., and "the said

> Esther Wood so being sworn and having taken her oath aforesaid, * * * upon the * * * hearing of said * * * cause, did wilfully, corruptly and knowingly and contrary to her said oath, swear and depose before the said United States Commissioner, and in said United States Commissioner's court among other matters material to said inquiry, in substance and to the effect following, that is to say: * * *''

And the indictment then further recites the facts relating to the subornation.

The word "issue" used twice in the above quotation is not an incorrect use thereof, since the United States Commissioner in every case brought before him, does try two issues, to-wit, whether the crime charged has been committed, and whether there is probable cause that this particular defendant did commit the crime. United States vs. Greene et al., 100 Fed. at p. 945; Latimer vs. State, 55 Neb. at p. 612; L. O. L., Section 1795 (*Supra*).

Therefore the indictment in this case does clearly set forth the essential allegations necessary to describe the Commissioner's hearing in which the subborned perjury was committed, in language which leaves no doubt in the appellant's mind as to what preliminary hearing was intended and who was the witness suborned, and the indictment is good.

This principle is expressed by CARPENTER, D. J., in *United States vs. Swift,* 188 Fed. at page 98:

> "It is apparent that the foregoing objections to the indictment go to matters of form rather than to matters of substance. An indictment is well enough that states facts which constitute a crime, and in language which leaves no doubt in the minds of the defendants of what they are accused. It is true that a defendant should be informed clearly by the indictment of the exact and full charge made against him, yet the manner in which the information is given is important. An indictment is sufficient when it contains a substantial accusation of crime, and its statements furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail him of his conviction or acquittal for protection against the further prosecution for the same offense, and when, from it, the court can determine that the facts charged are sufficient in law to support a conviction."

Since there are sufficient allegations in this indictment to describe the Commissioner's preliminary hearing wherein the perjury was committed, the word "trial" is verbiage and matter of form

only and as such cured by the remedial statute enacted for such purpose, which is Section 1025, R. S., previously quoted, and which abolished formal objections.

MORROW, CIRCUIT JUDGE, has concisely stated the principle applicable in this particular in the case of *Hedderly vs. United States,* 193 Fed. at page 565:

> "The objection that the charge of conspiracy is not sufficiently alleged is therefore made for the first time in this court; but, even if it be held that the demurrer did include such an objection, it will not avail the plaintiff in error, unless it appears that the substantial rights of the accused have been prejudiced by the refusal of the court to require a more specific and detailed statement of the paritcular means or mode employed in committing the offense. U. S. Rev. Stat., Sec. 1025. * * * In the present case it appears from the record that the defendants were fully advised of and understood the precise facts charged against them, and which were alleged to be in violation of the statute, and it does not appear that the substantial rights of the defendants were prejudiced in any way by the alleged lack of definiteness or certainty or the sufficiency of the facts charged in the indictment."

II.

Motion for Directed Verdict Properly Denied.

The rule governing trial courts in the determination of whether they shall direct a verdict of not guilty is expressed by MR. JUSTICE PECKHAM, in *France vs. United States,* 164 U. S. at page 681:

> "When proper and legal evidence has been given on the part of the government in a criminal trial, which if believed, is sufficient in law to make out a crime and to sustain a conviction of the person on trial, a request to the court to direct the jury to acquit must be refused, and an exception to such refusal raises no question of law, even though the evidence on the part of the defendant is much stronger and more satisfactory than that for the government. The question under such circumstances is one for the jury and not for the court."

And the learned justice continues in substance to state that where such evidence as he has above described, has been given on the part of the government with all proper inferences which may be drawn therefrom, and which inclines to the support of the government's case, the issue is one which properly goes to the jury for a finding thereon.

The same principle is well stated by ROSE, D. J., in *Duff vs. United States,* 185 Fed. at page 102:

> "In a criminal cause, where the evidence for the government, if assumed to be true in fact, together with all reasonable inferences from it, is not legally sufficient to support a verdict of guilty, it is the duty of the trial court, upon being moved thereto, to direct a verdict of not guilty."

But the trial court has passed upon the legal sufficiency and weight of evidence in this case and the appellate court has no authority to consider these points, but must confine its inquiry to whether there is *any* evidence to support the verdict.

This principle was accurately stated in this ninth circuit by MORROW, CIRCUIT JUDGE, in the case of *Hedderly vs. United States,* in 193 Fed. at page 571:

> "At the close of the evidence on the part of the prosecution, counsel for the defendant moved the court to instruct the jury to a verdict of not guilty. This motion the court denied, to which exception was taken. This denial left it open to the court to consider whether there was any evidence to sustain the

verdict though not to pass upon its weight or sufficiency * * * After verdict finding the defendant guilty, a motion was made for a new trial on the ground of the insufficiency of the evidence to justify the verdict. This motion was denied. The granting or refusal of such a motion was a matter of discretion in the court, and cannot be reviewed here. * * * We have no authority to inquire into the sufficiency of evidence to support a verdict. If there is any evidence, the issue of fact must be determined by the jury. It cannot be revised by the court."

And GILBERT, CIRCUIT JUDGE, in *Boren vs. United States,* 144 Fed. at page 804, has justly defined what legal dignity the term "any evidence" must bear to be binding upon the appellate court:

"If, as contended by the plaintiff in error, under the authority of Clyatt vs. United States, 197 U. S. 207, 25 Sup. Ct. 429, 49 L. Ed. 726, we are to examine the testimony to see if there was evidence to justify the jury's verdict, we have no difficulty in finding in the record evidence which, if credited by the jury, was sufficient to sustain their finding."

In the case at bar to illustrate that there was some evidence, which if the jury believed, would

justify a verdict, that testimony of Esther Wood is referred to, which states that she saw Mr. Cohen

> "the next morning (after her taking under mittimus) at the city jail * * * and he said they would take me up that morning and that I shouldn't talk until he got there, and should be sure and stick to my story * * * I was taken down here to the postoffice that morning and put in a room and sworn. I told them I refused to answer and wanted to see my attorney, Mr. Cohen. I didn't testify that day, and they took me back. First, Mr. Cohen came in and spoke there for awhile, and when I went into the hall, he asked me did I talk, and I told him 'No,' and he said 'Good.' "

This was all apparently in anticipation of the preliminary hearing and the advice to "stick to my story" undoubtedly had reference to the story the appellant had already given her, to-wit, that she "shouldn't talk until he got there," and to "deny she had ever sported" (Transcript of Record, p. 19), and when the postal cards between Jacob Cohen and herself were shown her as the written evidence of their familiarity, to "say you don't remember." (Transcript of Record, p. 20.)

The fact that her conduct upon the preliminary hearing was just as appellant had intended is shown by Esther Wood's testimony that when "he asked

me did I talk, and I told him 'No,' and he said 'Good.' " Here was the stamp of appellant's approval upon her conduct adopted because of his instructions thereon.

Although one prelimnary hearing had been held, and appellant knew it had been held and continued to another date, he still advised Esther Wood to "stick to my same story" (Transcript of Record, p. 21), and finally appellant informs her and definitely advises and procures her to swear falsely before the commissioner, as shown by the following testimony of the witness:

> "I saw Mr. Cohen at the city jail that noon, and he told me to stick to my story, and that they would have the preliminary at some time that afternoon, and he told me not to talk until he got there.
>
> "They brought me back to the postoffice building that same afternoon, and put me on the stand, Mr. Cohen being present, and I testified that afternoon of May 9th. just as Mr. Cohen advised me to tell. They asked me had I ever practiced prostitution in Baker, and I told them No, knowing at the time that I had, as a matter of fact, practised prostitution in Baker, and so testifying because Max G. Cohen

advised me to. They asked me whether I practised prostitution in Denver. I said No, knowing as a matter of fact that I had, and so testifying because Mr. Cohen advised me to. They asked me had I ever practised prostitution at any place in the United States. I told them No, knowing that it was untrue and that I was swearing falsely; and they asked me had I ever practised prostitution in Portland, and I told them No, knowing that I had, and so testifying because Mr. Cohen advised me that way, and said it was the only way to save Jake Cohen, because they found the tickets on him.

"At that examination they exhibited the postal cards to me, which I recognized, and the one now shown me is one of them. It was sent me by Jake Gronich, from Canton, Ohio, and received by me in Denver, Col. (Postal card marked government's Ex. 4.) I also recognized this card which was shown to me at that examination and which was received by me in Portland, Oregon, from Jake Gronich. They asked me at the examination had I ever seen this card, and I said once No, and then I said that I didn't remember, and I knew I had seen the card before and was swearing falsely. I so testified because my lawyer advised me to.

"Another card was shown to me, which is in my own handwriting, and they asked me whether it was my handwriting, and I told them No, and then I told them that I didn't remember; and when they asked me had I ever seen the card before, I told them that I didn't remember. I knew at the time that I had seen it before and did remember it, but so testified because my attorney advised me to. The Max G. Cohen I have spokne of as my attorney is the defendant here." (Transcript of Record, pp. 21-23.)

The above testimony of Esther Wood to the effect that she was advised by Cohen to testify that she did not remember the postal cards is corroborated by the testimony of Violet Woods. (See Transcript of Record, p. 39.)

The above testimony of Esther Wood to the effect that she was advised by Cohen that she had never practised prostitution, is corroborated by the testimony of Rose Heller. (See Transcript of Record, p. 35), and the testimony of Violet Woods (See Transcript of Record, p. 39).

The foregoing testimony establishes the fact that Esther Wood did testify falsely and did so in execution of the very plans, advice and procuration of Cohen.

This testimony further establishes the motive in procuring and advising her to testify falsely, to-wit: his client's interest being his own, he advises her of the only way to save her husband.

And, finally, this quoted bit of testimony brings out the fact that while Esther Wood may, and does at times use the word "they" as referring to non-judicial officers, because her ignorance allowed her no more accurate description of the officials or proceedings in which she was a witness, she also applies the word "they" to judicial officers and inquirers in judicial proceedings. There is no magical application of the word "they" found here, as appellant would suggest in his brief (pages 36-38), but just an ordinary general use thereof by a person of limited knowledge and means of expression.

Is there some testimony here for the jury to cerdit? If so, the motion for a directed verdict of acquittal was properly denied by the trial court.

Appellant (See Brief, p. 40) raises a question concerning the corroboration of testimony in cases of subornation of perjury. If corroboration is necessary, there is sufficient to meet all requirements of the law, as stated by GILBERT, CIRCUIT JUDGE, in *Boren vs. United States,* 144 Fed. at page 805:

"We find that in People vs. Evans, 40 N. Y. 1, it was held that subornation of perjury may not be proven by the uncorroborated testimony of the person suborned. The contrary was held by Judge Deady in United States vs. Thompson (C. C.) 31 Fed. 331. In State vs. Renswick, 85 Minn. 19, 88 N. W. 22, it was held that, where it is sought to establish by his own testimony the perjury of the person suborned, his testimony must be corroborated, but that the facts that the accused suborned or induced him to commit the crime may be established by the uncorroborated testimony of the witness if it satisfies the jury beyond a reasonable doubt."

Appellant further complains that he is convicted upon the testimony of three self-confessed prostitutes (There is no evidence of their being "habitual," as stated in appellant's brief, p. 2), but appellant testified in his own behalf, and now must find his consolation in the fact that the jury must pass upon the credibility of witnesses.

United States vs. Brown, Fed. Cas. No. 14, 667.

The courts have so repeatedly held that the jury is the exclusive judge of the weight of the testimony and the credibility of the witnesses that citation of

authorities to establish that poiont of law seems out of place in this brief. Here we have the testimony of three witnesses and strong corroborative circumstances to prove that the appellant, a practising attorney, wilfully and deliberately advised and procured a witness to testify falsely in a criminal procedure. He now urges that, admitting the immorality of his offense, he has committed no crime against the statute, because of the fact that the perjured testimony was not material to the issue. Cohen was charged with having transported his own wife for the purpose of prostitution and debauchery. Was it not material to prove that at the place from which she was transported, at the place through which she was transported and at the place to which she was transported, she was a public prostitute? It would, of course, be perfectly proper for a man to transport or accompany his own wife from one state to another, but when we find a man transporting his own wife for unlawful purposes from one state into another, is it not material, under the Mann Act, to prove that at the place from which she came, at the places through which she was transported and at the place to which she was transported, she was a public prostitute and practised as such? The appellant, as an attorney, evidently recognized the materiality of this testimony, because it is shown by the record that he advised the witness, Esther Wood, to testify falsely concerning it. It is admitted that Esther Wood did appear before the

United States Commissioner at a time when the appellant was present, and there in his presence, he heard her under oath testify falsely, just as he had advised her to do. Whether the testimony given against the appellant was entitled to credence or not was a question solely for the jury, and the jury decided the issue against the appellant. If it is to be now held that the testimony of a woman who admits her prostitution in open court, is not entitled by a jury to credence, then the Mann White Slave Act might just as well be repealed, because in this class of cases, after a woman has been made a prostitute she will probably be the only person capable of testifying to the facts material to sustain a charge under the White Slave Act. The appellant, at the time he called upon these women, knew that they were prostitutes. It will, of course, be, by the court, as it must have been by the jury, borne in mind that if a man is going to suborn a person to commit the crime of perjury, he will not select a leading citizen of the state, but such a crime will be practised upon the poor, the down-trodden and the unfortunate; and as scarlet as these women were, they were entitled to more credence than an attorney so unmindful of his oath as to advise them to commit the crime of perjury; it is a fact held by all prosecutors in cases of this character that this class of unfortunate, fallen women place the utmost reliance upon advice given to them by their attorneys; with the hand of organized society raised against them, with the doors of

every home closed to them, with the knowledge that no self-respecting man or woman will speak to or recognize them upon the street, subject as they constantly are to the grafting demands of petty officers, the only class of men disguised by a semblance of respectability with whom they come in contact are the attorneys who appear for them when they are arrested or in trouble; and these women follow the advise of attorneys implicitly.

Every fact necessary to prove the crime charged in the indictment was proven by more than one witness and strong corroborative circumstances.

III.

No Immaterial Evidence Was Admitted.

(*a*) The admission of the United States Commissioner's complaint in this case was necessary and proper on two grounds: *First.* Under the authorities it is necessary that the crime of perjury be alleged, and in so alleging it, there is necessity of alleging the proceedings in which the perjury occurred.

HAMMOND, D. J., in the case of *United States vs. Howard,* 132 Fed., at page 333, said:

"It is conceded, however, by the district at-

torney that, notwithstanding these reformatory statutes, it is still necessary to aver in an indictment for subornation of perjury all of the essential elements of the perjury committed by the witness suborned, just as if that witness himself were on trial for the crime of perjury, and it is by that rule we must test these indictments * * * in charging subornation of perjury, it is necessary to carry within the indictment every essential averment concerning the perjury itself by the witness suborned, just as if that witness were accused by the same indictment of the perjury for the purpose of placing him on trial for that offense (Page 336). * * * The argument made by the learned counsel for the defendant against this position is that it is settled by the cases and conceded by the district attorney that an indictment for subornation of perjury must be founded in its averments about the subornation against the defendant upon each and every necessary allegation concerning the perjury of a suborned witness that is required by law to be inserted in an indictment against that witness for the perjury. He very happily calls it a circle within a circle of indictments, each of which must be complete."

And to prove the allegations of the indictment and the commissioner's hearing the complaint was

a necessary and proper bit of evidence.

Second. It is shown by the commissioner's complaint (Transcript of Record, p. 41) that it became material under the charge there made against Jacob Gronich to know whether Esther Wood was (1) a prostitute, (2) familiar with and knew Jacob Gronich, and (3) was transported in a forbidden interstate traffic. Therefore, the complaint was admissible to show the materiality of the false or perjured testimony, as well as the fact that Esther Wood was a material witness to prove these matters which were peculiarly within her knowledge.

In what better manner than by the introduction of the complaint in the case of United States vs. Jacob Gronich could the issues involved in that hearing be proved?

(*b*) The testimony of Esther Wood given before the commissioner in the preliminary hearing was admissible (Barring the consideration of material privilege discussed under (*d*) *infra*) because it was from a witness who could inform the committing magistrate whether there had been a crime committed by interstate transportation of a prostitute, and whether there was probability that the defendant charged, had committed the transportation. This testimony was given, but insofar as it related to the practice of prostitution, the same was false. The evidence shows that this testimony was known and intended to be false, though under oath, at the instance of the appellant Cohen.

Therefore this evidence was admissible because material and because it was perjured, as alleged in the indictment, and perjured because of the procuration, instigation and advice of Cohen.

(*c*) The postal cards exhibited to Esther Wood at the commissioner's hearing were admissible therein to connect this witness with the defendant, there being *prima facie* no similarity of names, and to show the familiarity between the transporter and the transported; also the postal cards themselves showed the cities in the different states where the prostitute had been.

This evidence being false, was admissible as previously explained, in connection with the testimony of Esther Wood.

(*d*) Appellant contends, truthfully, that it is axiomatic that evidence which is prohibited cannot be legally material and that the statute and authorities require the testimony upon which the crimes of perjury, as well as subornation of perjury, are based must be predicated upon material testimony.

Appellant further claims, improperly the government submits, that the testimony of the wife, Esther Wood, was prohibited in the commissioner's hearing against the husband, Jacob Gronich, and

therefore not material and not such evidence as would form the basis of the crime of perjury, and therefore the crime of subornation of perjury.

First. The answer to this contention as outlined in the corresponding division of Points and Authorities, p. 17, is to show that appellant's theory of the adoption of Sec. 1535 of Lord's Oregon Law is not correct. Appellant claims that said section, which provides that neither the husband or wife will be allowed to testify against the other in criminal cases, except on consent of both or in cases of personal violence by one on the other, governs the admission of testimony in hearings before the United States Commission, because this section of the Oregon State law was adopted by congress along with the criminal procedure. by Sec. 1014 of the R. S.

It is clear, of course, that no Oregon State criminal procedure was adopted by the Judiciary Act of 1789, and counsel relies upon this Sec. 1014 R. S. as being the further act of congress, which CHIEF JUSTICE TANNEY said in the case of *United States vs. Reid,* 53 U. S., at page 363, was necessary to secure further application of state criminal procedure to the federal court.

The reasons why Sec. 1014 R. S. does not apply to the qualifications of witnesses appearing before

the United States Commissioner are at least three in number.

1. By the terms of the statute, which is set forth in full in page 17, of this brief, it is clear that this section applies only to procedure or steps in the process of commitment, and not to qualifications of witnesses.

RAY, DISTRICT JUDGE, in *United States vs. Baumert et al.,* 179 Fed., at page 742, said:

> "I do not think Sec. 1014 Rev. St. * * * has anything to do with regulating prosecutions by information. That section relates to preliminary examinations before a justice, judge, or United States Commissioner for the purpose of issuing a warrant and holding to bail for appearance at court to answer to an indictment presented by a grand jury or to an information filed by a United States attorney."

And ROSS, CIRCUIT JUDGE, said in *United States vs. Dunbar, et al.,* 83 Fed., at page 154:

> "The purpose and effect of the use by congress of the words in the foregoing provision, 'agreeably to the usual mode of process against offenders in such state,' was to assimilate all the proceedings for holding accused persons to answer before a court of the United States to the

> proceedings had for similar purposes by the laws of the state where the proceeding should take place. A United States Commissioner, acting under this statute, is simply a committing magistrate."

The expression, "mode of process," which counsel contends means qualifications of witnesses, has a particular judicially defined meaning, to-wit: "procedure," and does not relate to qualifications of witnesses.

MAXEY, D. J., said in *United States vs. Sauer,* 73 Fed., at page 673:

> "In the three cases cited (U. S. vs. Rundellt, 2 Curt, 41-48, Fed. Cas. No. 16,208; U. S. vs. Horton, 2 Dill. 94, Fed. Cas. No. 15,393; U. S. vs Case, 8 Blatchf. 250-254, Fed. Cas. No. 14,-742) the decisions are based upon the ground that, under Sec. 1014, Rev. St., the courts are relegated to the state statutes to ascertain and determine the nature and extent of the duties and powers of commissioners in arresting, imprisoning and bailing persons accused of offense against the United States."

DEADY, D. J., in *United States vs. Martin,* 17 Fed., at page 155, said that Sec. 1014 R. S.:

" * * is the authority under which a commissioner of the circuit court acts when engaged in a proceeding for the arrest, commitment or bail of a person charged with a crime against the United States, and such section provides that he shall proceed therein, 'agreeably to the usual mode of process' against offenders in such state.

"A commissioner acting under this statute is simply a committing magistrate . The ambiguous phrase, 'Mode of process,' is interpreted to mean 'Mode of proceeding,' and this proceeding is according to the law of a state in similar cases. (Authorities.)

"The validity of the process and order in question must, then, be determined by reference to the law of Oregon for the arrest, examination and commitment of persons charged with the commission of crime against the laws of a state. The statute law of a state upon the subject is found in chapters 33, 34, 35 and 36 of the Code of Civil Procedure."

And MR. JUSTICE BREWER said, in *United States vs. Patterson,* 150 U. S., at page 67:

"It was held in the case of U. S. vs. Ewing, 140 U. S. 142 * * * that, in view of Sec. 1014

of the Revised Statutes, the law of a state in which the services are rendered must be looked at in order to determine what is necessary in the matter of procedure."

Under consideration of appellant's contention a review of some one hundred and fifty adjudications of this section was made, and in no one of these cases was there the slightest suggestion that this portion of the Revised Statutes applied to qualifications of witnesses.

2. Though the statute does refer the United States Commissioner to his state practice for his proceedings, it cannot be presumed, in the absence of an expressed intent on the part of congress, that there are to be different qualifications for witnesses appearing before United States Commissioner from those who appear before United States courts. State laws cannot be presumed to govern one while common law governs the other.

3. This section was originally a portion of the Act of September 24, 1789, and was modified by Act of August 22, 1842, Ch. 188, 5 Stat. L. 516, and was therefore in existence when MR. JUSTICE GRAY made his famous decision in the case of *Logan vs. United States* (1892), 144 U. S., 263, in the rendering of which he was unable, though assisted by

learned counsel, to find any act of congress modifying the common law rule governing the competency of witnesses.

Therefore, how can Sec. 1536, Lord's Oregon Law, enacted in 1864, be adopted as a rule governing witnesses appearing in United States cases in this district?

But granting, without admitting, that this section of Lord's Oregon Law does apply, the exception therein named, to-wit: that of "personal violence," would still authorize the admission of the testimony of Esther Wood against her husband under the following rudimentary rules discussed in the second section of this assignment of error.

Second. Under this division of Points and Authorities (page 20) citation is made to the fact that so far as the District Court of the United States for the District of Oregon is concerned the competency of witnesses is governed by rules of the common law.

MR. JUSTICE GRAY, in *Logan vs. United States,* 144 U. S., at page 303, said:

> "And, therefore, the competency of witnesses in criminal trials in the courts of the United States is not governed by a statute of the state

which was first enacted in 1858, but, except so far as congress has made specific provisions upon the subject, is governed by the common law * * *"

And MR. JUSTICE BREWER, in *Bassett vs. United States,* 137 U. S., at page 505, has concisely stated that:

"It was a well known rule of the common law that neither husband or wife was a competent witness in a crimnal action against the other, except in cases of personal violence, the one upon the other, in which the necessities of justice compelled a relaxation of the rule."

The reasons for this rule have been enumerated under Points and Authorities, and suffice it to say that the principal one is that of public policy in avoiding the danger of disturbing the marital peace.

SARGEANT, J., in *Kelly vs. Proctor,* 41 N. H. at page 142, said:

"We believe that the true reason why a wife should not be allowed to testify either for or against her husband * * * has always been a sort of compound reason founded partly in interest, to be sure, and the identity of the persons, but partly also upon conditions of public

policy. We think that considerations of public policy—the fear of sowing dissension between man and wife, and of occasioning perjury * * are equally satisfactory reasons why they should not be allowed to testify in each other's favor. It is to be feared that * * * the wife would find herself called upon too often to choose between her duty to her God and the requirements of (not to say her duty to) her husband * * *."

Therefore when the reasons for this common law rule are removed, and particularly the above mentioned reason founded on public policy, should not the courts relax the strictness of its application?

In other words, is the beautiful, mystic garment of *pax conjugalis* of such great force that it protects White Slavers in their concubinage and prostitution? Has not the previous gross violation of marital duties precluded any such possible breach of marital peace that the law must privilege the testimony of either party?

Legal precedents hold that the testimony of Esther Wood was admissible in the preliminary hearing of her husband for violation of the Mann Act, because it sounded in two of the well established exceptions to the common law rule preventing a wife

from testifying against her husband. These are:

(1) She has suffered personal violence, as Mr. Wigmore says in his monumental work on Evidence, Sec. 2239:

> "At common law in early practice the notion of an injury to the wife was not regarded as including much more than those corporal brutalities which satisfy most gross and elementary conceptions of wrong. But as times have gone on, more refining distinctions have been countenanced; especially under the statutory exceptions for crimes against the other, it has been possible for courts to take a broader view."

Under this section some courts have held adultery, incest and bigamy to be within the meaning of the statute avoiding the privilege. This is not necessary in federal courts under 24 Stat. L. 635, covering such cases.

And (2) if the wife were not permitted to testify against her husband she would be continuously exposed without remedy, to his brutal treatment and personal injuries.

See MR. JUSTICE BREWER'S statement in *Bassett vs. United States,* 137 U. S., at page 508, next last above quoted.

J. D. McPHERSON, D. J., in the case of *United States vs. Rispoli,* 189 Fed., at page 273, said:

"The court overruled the defendant's objection of privilege, and permitted the witness to be examined, on the ground that the offense charged was against the wife's person as really as if the defendant were charged with threatening to inflict physical violence, or of having actually struck her. In cases where the wife's personal rights were concerned, the exceptions to the husband's privilege should be benevolently regarded, and the offense in question was essentially within the spirit of the long established rule that allows her to testify in protection or in vindication of her right to be secure in her person against threat or assault, even by her husband."

The above case was one in which the defendant charged with the violation of the Mann Act raised the question of his privilege to prohibit the wife from testifying against him. The case is on "all fours" with the one at bar and is justified under the above mentioned and established exception to the common law rule.

The consideration of this matter of privileged testimony is left with a *quere* unanswered because of lack of time for research. Can the appellent Cohen, who is not the husband of the witness, claim that her testimony is privileged when used against

him, the appellant, in the absence of any such claim on the part of her hubsand?

The essence of the privilege in the above common law rule is to protect the confidence and conjugal peace only, and thereby foster confidence. Wherein can the law feel any necessity in behalf of this stranger to the marital relation in privileging this testimony?

Wigmore, "Evidence," Secs. 2336-2340.

IV.

No Error in the Court's Instructions.

Both the instructions of the trial court assigned as errors seven and eight, dealt with the testimony of the wife against her husband and to the effect that this testimony was not privileged. These alleged errors have been dealt with under the previous discussion and no further note need be taken thereof, except to conclude that the trial court made no error in its declaration of the law, but was supported by a historic line of exceptions to the historic rule.

V.

Miscellaneous Refutations.

On page sixty-one of the brief of the appellant

the act of congress known as the "White Slave Act" is designated as and referred to as a "huge joke." The same views were evidently entertained by the appellant at the time he counseled Esther Wood to commit the crime of perjury. The law may be a "joke" to a police court practitioner or to one whose principal business is the defense of men charged with this, the vilest of crimes; but to the self-respecting, decent American citizen the law appeals as one enacted for the benefit of society, to prevent a lot of vultures from preying upon the necessities of unfortunate and ignorant women. The law which prohibits a vampire from living off the earnings of creatures of the under-world may be a "joke" to the appellant and his attorneys, who characterize it as such, but to the majority of American citizenship it appeals as a most forceful weapon to be used in stamping out the most damnable, pernicious and unpardonable sin and crime; the law is not regarded as a "joke" by this office, and the presence of many immaculately dressed pimps and macquereaux in federal prisons is a splendid testimonial that the law is not considered as a "joke" by federal judges and juries. The presence of such a statement as this in a brief, filed in one of the highest courts of the land, furnishes almost conclusive proof of the character of the man in whose behalf the brief was written.

There are so many inconsistencies and misstatements in the brief of the appellant that it will be impossible to call attention to all of them. A few of the most glaring, however, should not be passed without comment.

On page sixty-six of the brief is the voluntary observation that the appellant walked into a trap set for him. There is no evidence to prove this assertion. What he did was to deliberately advise a woman to commit perjury. This is a favorite resort of police court lawyers, and it is regrettable that more of them are not caught at their nefarious practice and put in places where they can no longer prey upon the public and outrage the decency of the profession they disgrace by their being associated with it.

It is charged on page seventy that Esther Wood was released on $50.00 bail and that this is strong evidence that the government was very lenient with her, but the proof showed that she had already spent months in jail for a wrong for which she was not to blame, but for which the appellant was entirely to blame. It does not sound well for the appellant to speak of leniency being shown a criminal and to complain of the same. He stands convicted of the crime of subornation of perjury, a crime not only

against the laws of his country, but against the very oath that he took as an attorney. He is released on bail and the bail which he gave was easier for him to produce than it was for the prostitute, Esther Wood, to produce a bail of $50.00 after she had been in jail for months.

On page seventy of the brief appears this glaring misstatement: "With such witnesses and under threats of sending one of them to Lansing, the government has pursued the appellant with unflinching zeal." What the government has done is to insist that the attorney who advises a prostitute to commit the crime of perjury should not be permitted to longer disgrace the honest profession of law and to decline to admit that an attorney is privileged from prosecution.

IN CONCLUSION, IT IS SUBMITTED that the appellant had a fair and impartial trial, before a fair and impartial judge and jury; that he was duly convicted, as he ought to have been; that the situation that now confronts him is not the result of anything other than his own deliberate, wrongful, base and dishonest act, as proven by competent witnesses at his trial; for these reasons the government insists that the verdict should be upheld and should receive the approval of this Honorable Court.

With the hope that this brief may be of some assistance in arriving at a just conclusion, it is

Respectfully submitted,

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